



COMMITTEE ON HOUSE ADMINISTRATION  
CHAIRPERSON ZOE LOFGREN (D-CALIF.)

SUBCOMMITTEE ON ELECTIONS | 117TH CONGRESS

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**REPORT ON**  
**Voting in America:**  
**Ensuring Free and Fair**  
**Access to the Ballot**

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PREPARED BY CHAIR G. K. BUTTERFIELD (D-N.C.)  
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# EXECUTIVE SUMMARY

Since our founding, Americans have not enjoyed equal access to the ballot. Indeed, only a small fraction of the population cast ballots in the election elevating George Washington as our first president. Throughout our history, the country has made strides forward, but that progress was neither linear nor uncontested,<sup>1</sup> and access to the ballot remains unequal. Following nearly 100 years of suppression and discrimination in the post-Civil War United States, and a decades-long fight for equality and access to the vote, on August 6, 1965, President Lyndon B. Johnson signed the Voting Rights Act of 1965 into law. The purpose of the Voting Rights Act was to, “banish the blight of racial discrimination in voting.”<sup>2</sup> And for nearly 50 years it served this purpose.

However, in 2013, the Supreme Court undercut a key provision of the Voting Rights Act in *Shelby County v. Holder*. In finding the Section 4(b) coverage formula unconstitutional, the Section 5 preclearance provisions were rendered essentially inoperable. States that were once covered by the Voting Rights Act (“VRA”), and therefore required to preclear their voting changes with the U.S. Department of Justice to ensure they did not have a discriminatory impact on minority voters, were now free to enact changes without oversight, and with only the threat of reactive litigation under Section 2 of the Voting Rights Act or the Constitution standing in their way. Since the Court’s decision in *Shelby*, states across the country have enacted new, suppressive voting and election administration laws that disproportionately and discriminatorily impact minority voters.

On July 1, 2021, the Supreme Court undermined the Voting Rights Act yet again in *Brnovich v. DNC*.<sup>3</sup> Writing for the majority, Justice Samuel Alito weakened the protections Congress explicitly wrote into the statute in 1982 and reauthorized in 2006, and instead set forth a new set of guideposts that will arguably make it harder to combat discriminatory restrictions on voting.<sup>4</sup> In her dissent, Justice Elena Kagan wrote, “the majority writes its own set of rules, limiting Section 2 from multiple directions. Wherever it can, the majority gives a cramped reading to broad language.”

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*“Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”*

— Justice Ruth Bader Ginsburg,  
*Shelby County v. Holder* (dissent)

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<sup>1</sup> Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 2 (Basic Books, Revised Edition 2009).

<sup>2</sup> *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

<sup>3</sup> *Brnovich v. DNC*, 594 U.S. \_\_\_\_ (2021).

<sup>4</sup> *Id.*

Time and again, in courtrooms across the country, it has been proven that racially polarized voting has existed at the ballot box since 1870, when the Fifteenth Amendment was ratified, and it persists today. Millions of Black, Latino, Asian American, Native American, and other minority voters have again become the targets of voter suppression.

## COMMITTEE ON HOUSE ADMINISTRATION AND SUBCOMMITTEE ON ELECTIONS

The Committee on House Administration was established in 1947. Oversight of federal elections became one of the Committee’s chief tasks at its inception. After more than 70 years, the Committee’s principal functions still include oversight of federal elections.<sup>5</sup> Under Rule X of the Rules of the House, the Committee on House Administration has jurisdiction over “Election of the President, Vice President, Members, Senators, Delegates, or the Resident Commissioner; … and federal elections generally.”<sup>6</sup> Since its creation, the Committee on House Administration has had a hand in shaping legislation that touches on any and all aspects of federal elections.<sup>7</sup>

In exercising those powers, throughout the 116<sup>th</sup> and 117<sup>th</sup> Congresses, the Subcommittee on Elections of the Committee on House Administration has reviewed the state of voting in America, collecting thousands of pages of testimony and evidence—and the conclusion is clear: minority voters in America face ongoing discrimination in voting and barriers to the ballot box.

In writing for the majority in *Shelby County*, Chief Justice John Roberts wrote that “[t]he Fifteenth Amendment is not designed to punish for the past; its purpose is to ensure a better future.”<sup>8</sup> Moreover, the Chief Justice wrote that Congress must craft a remedy that, “makes sense in light of current conditions.”<sup>9</sup> The Subcommittee endeavored to learn and gather the most contemporaneous evidence available and to identify the voting and election administration practices that cause discriminatory harm to voters—that evidence is summarized in the report that follows.

To collect this evidence, the Subcommittee on Elections held eight hearings and a listening session in the 116<sup>th</sup> Congress, calling more than 60 witnesses, gathering several thousand pages of written testimony, documents, and transcripts, and hearing hours of oral testimony. To begin the process, the Subcommittee cast a broad reach, examining all manner of voting rights and election administration barriers. That process resulted in a report detailing a wide range of issues in voting and election administration laws implemented by states in the years following the *Shelby County* decision.

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<sup>5</sup> Committee History and Jurisdiction, Comm. on House Admin., <https://cha.house.gov/about/committee-history-and-jurisdiction>.

<sup>6</sup> Rules of the House, U.S. House of Representatives, 117<sup>th</sup> Cong. (2021), Rule X, clause 1(k).

<sup>7</sup> Committee History and Jurisdiction, Comm. on House Admin., <https://cha.house.gov/about/committee-history-and-jurisdiction>.

<sup>8</sup> *Shelby County v. Holder*, 570 U.S. 529, 133 S.Ct. 2612, 2629 (2013).

<sup>9</sup> *Id.*

Building upon the record gathered during the prior Congress and continuing the collection of contemporaneous evidence to establish the state of “current conditions,” during the 117<sup>th</sup> Congress the Subcommittee embarked on a series of five investigatory hearings. Under the Chairmanship of Congressman G. K. Butterfield (D-N.C.), the Subcommittee identified those voting and election administration practices that the Subcommittee observed previously, including those which exhibited the most significant evidence of discriminatory impact, and investigated further. In doing so, the Subcommittee determined that a number of specific practices warranted a more in-depth examination, specifically: (1) voter list maintenance and discriminatory voter purges; (2) voter identification (“voter ID”) and documentary proof of citizenship requirements; (3) lack of access to multi-lingual voting materials and language assistance; (4) polling place closures, consolidations, reductions, and long wait times; (5) restrictions on additional opportunities to vote; and (6) changes to methods of election, jurisdictional boundaries, and redistricting.

The Subcommittee heard hours of testimony from more than 35 witnesses and collected numerous reports and documents. The testimony and data show definitively that the voting and election administration practices examined can and do have a discriminatory impact on minority voters and can impede access to the vote.

Key findings of the Subcommittee include:

**(1) Purging voters from voter rolls** can disproportionately flag for removal, mark as inactive, or ultimately remove otherwise eligible minority voters from the rolls. Although voter list maintenance, when conducted correctly, is appropriate and necessary, misconceived, overzealous list maintenance efforts have erroneously sought to remove hundreds of thousands of properly registered voters and, in doing so, disproportionately burden minority voters. In the years following the *Shelby* decision, millions of voters have been removed from the voting rolls—and states once subject to the Voting Rights Act saw purges at a **40 percent higher rate** than the rest of the country.<sup>10</sup> As Sophia Lin Lakin of the ACLU testified before the Subcommittee:

Some of these troubling purge practices are based on unreliable data and/or procedures or dubious proxies that disproportionately sweep in, and ultimately disenfranchise, voters of color. Oftentimes, such purges have occurred too close to an election to permit corrective action, with voters arriving at the polls only to discover they have been removed from the rolls and unable to cast a ballot that will count.<sup>11</sup>

For example, mailers initiating a Wisconsin voter purge effort were disproportionately sent to counties with disproportionately large Black and Latino populations—over one-third of mailers were sent to areas that are home to the largest Black voting populations, while the

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<sup>10</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021); written testimony of Michael Waldman at 2.

<sup>11</sup> *Voting in America: The Potential for Voter List Purges to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Sophia Lin Lakin at 3.

Black voting population comprises only 5.7 percent of the total electorate.<sup>12</sup> Additionally, Dr. Marc Meredith of the University of Pennsylvania testified that research, “demonstrates that minority registrants are more likely than White registrants to be incorrectly identified as no longer eligible to vote at their address of registration.”<sup>13</sup>

## **(2) Voter identification and documentary proof-of-citizenship requirements**

disproportionately burden minority voters. Discriminatory strict voter ID laws were some of the first voting laws implemented in the wake of *Shelby County*—in 2013, at least six states implemented or began to enforce strict voter ID laws, some of which had been previously blocked by the Department of Justice under Section 5 of the Voting Rights Act.<sup>14</sup> Studies have consistently demonstrated that minority voters are disproportionately likely to lack the forms of ID required by voter ID laws and are disproportionately burdened by the time and expense of acquiring the underlying documents and IDs. The consequence is a negative impact on turnout amongst minority voters. A recent study found that Latinos, for example, are **10 percent** less likely to turnout in general elections in states with strict ID laws than in states without such laws.<sup>15</sup> Even when states offer “free” IDs, the actual cost of obtaining a qualifying photo ID ranged from \$75 to \$368 due to indirect costs associated with travel time, waiting time, and obtaining necessary supporting documentation.<sup>16</sup> The documents required to establish proof-of-citizenship are also particularly expensive to obtain for naturalized and derivative citizens, sometimes costing in excess of \$1,000.<sup>17</sup>

The burden of these requirements disproportionately fall on Black, Latino, Asian American, and Native American voters, and newly naturalized citizens. Recent studies have demonstrated that Black and Latino voters are less likely to have access to birth certificates and passports—documents often required to establish proof of citizenship—than White voters.<sup>18</sup> For example, Asian Americans will face greater barriers to registration than White voters under proof-of-citizenship laws. As Terry Ao Minnis, Senior Director of Census and Voting Programs for Asian Americans Advancing Justice, testified, “76.7 [percent] of Asian American adults are foreign-born and 39.5 [percent] of Asian American adults have naturalized nationwide, compared to 4.6 [percent] of White adults who are

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12 Shruti Banerjee and Stuart Naifeh, *How the Wisconsin Voter Purge Targets Black Voters*, DEMOS (Dec. 20, 2019), <https://www.demos.org/blog/how-wisconsin-voter-purge-targets-black-voters>.

13 *Voting in America: The Potential for Voter List Purges to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Marc Meredith at 1.

14 *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021); written testimony of Michael Waldman at 3.

15 Zoltan Hajnal *et al.*, *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POL. 363 (2017).

16 Richard Sobel, *The High Cost of ‘Free’ Photo Voter Identification Cards*, Charles Hamilton Houston Institute for Race & Justice (June 2013).

17 *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Terry Ao Minnis at 10-12.

18 *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Andrea Senteno at 5-6.

foreign-born and 3.8 [percent] who have naturalized.”<sup>19</sup> Numerous studies also have demonstrated that strict voter ID laws disproportionately decrease registration and turnout of minority voters relative to White voters. Dr. Nazita Lajevardi of the University of Michigan testified that, “strict voter identification laws are racially discriminatory and have real consequences for impacting the racial makeup of the voting population.”<sup>20</sup>

**(3) Access to multi-lingual voting materials and assistance** is critical to ensuring equal access to the ballot—failure to do so can negatively impact millions of potential voters, a disproportionate number of whom are minority voters. The demographics of America are shifting, with millions of new Latino and Asian American voters, for example, joining the rolls every election. The number of eligible Asian Americans grew by almost 150 percent from almost 5 million in 2000 to over 11.5 million in 2020—this compared to a growth rate of 24 percent for the total population over the same period.<sup>21</sup> Furthermore, American Community Survey (ACS) data estimate show that Latinos accounted for just over half the nation’s population growth between 2010 and 2019, and ACS data estimate shows that Latinos made up over 44 percent of the entire nation’s growth in citizen, voting-age population, between 2009 and 2019.<sup>22</sup>

According to 2017 data, more than **85 percent of the voters** who likely require language assistance in voting were voters of color.<sup>23</sup> As of 2019, approximately 4.82 percent of the citizen voting-age population needs to cast a ballot in a language other than English.<sup>24</sup> For example, over a quarter of all single-race American Indian and Alaska Natives speak a language other than English at home,<sup>25</sup> almost three out of every four Asian Americans speak a language other than English at home, and almost one in three Asian Americans has limited English proficiency.<sup>26</sup> When limited-English proficient (LEP) voters are provided with voting materials in their native language the likelihood they will participate in the political process increases. Dr. Matt Barreto of the UCLA Latino Policy and Politics Initiative testified that studies have found, “between a **7 and 11 point increase** in voter

19 *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Terry Ao Minnis at 10.

20 *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Nazita Lajevardi at 4-6.

21 *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Terry Ao Minnis at 2-3.

22 *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021); written testimony of Thomas A. Saenz at 2.

23 *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Andrea Senteno at 7.

24 *Voting in America: Ensuring Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Sonja Diaz at 20.

25 *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Matthew L. Campbell at 5.

26 *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Terry Ao Minnis at 5.

turnout given access to Spanish materials.”<sup>27</sup> Conversely, failure to provide the proper non-English voting materials has, “a tremendously negative impact on those communities’ ability to understand and participate in our elections.”<sup>28</sup>

**(4) Polling place closures, consolidations, reductions, and long wait times at the polls** all disproportionately burden minority voters and can be implemented in a discriminatory manner. Issues related to polling place locations, quality, accessibility, and the ensuing long wait times to vote are pervasive. Over the past decade, it has been well documented that racial minorities wait longer to vote on election day than White voters.<sup>29</sup> Additionally, disparities in polling place accessibility and wait times are compounded by the disparate impact of other discriminatory practices such as voter ID laws, voter purges, and cuts to alternative opportunities to vote. A lack of available polling place locations necessitates traveling long distances to vote, which also disproportionately burdens minority voters, in particular Native American voters. A 2019 report by The Leadership Education Fund found that between 2012 and 2018 a total of **1,688 polling places** had been closed in the previously covered jurisdictions examined, almost double the rate identified in 2016.<sup>30</sup> Polling place closures and long wait times have been shown to reduce the likelihood a voter will vote in a subsequent election, decreasing turnout. Minority voters not only wait longer on average, but they are also more likely to experience wait times exceeding 60 minutes, a wait time largely recognized as unacceptable. Dr. Stephen Pettigrew of the University of Pennsylvania testified that, “[a] voter’s race is one of the strongest predictors of how long they wait in line to vote: non-white voters are **three times** more likely than White voters to wait longer than 30 minutes and **six times** as likely to wait more than 60 minutes.”<sup>31</sup> Additionally, long lines negatively impact voters’ confidence in the electoral system. Dr. Pettigrew testified that, “[v]oters who wait in a long line are less likely to believe that their vote choices would be kept a secret, and less likely to be confident that their vote was counted correctly”<sup>32</sup> and that, “[b]ecause voters’ experiences at the polling place have downstream consequences on their future turnout behavior and their confidence in the electoral system, policies that widen the wait time gap between White and non-white voters have the potential to put a thumb on the electoral scale by reshaping the electorate.”<sup>33</sup>

**(5) Restricting access to opportunities to vote** outside of traditional Election Day voting has a disproportionate and disenfranchising impact on minority voters. Early voting, and especially weekend early voting, is a critical tool to ensuring access to the ballot and

<sup>27</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Matt Barreto at 9.

<sup>28</sup> *Id.*, see hearing transcript at 62.

<sup>29</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Kevin Morris at 2.

<sup>30</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Jesselyn McCurdy at 3.

<sup>31</sup> *Voting In America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Stephen Pettigrew.

<sup>32</sup> *Id.* at 8.

<sup>33</sup> *Id.* at 2.

reducing wait times at the polls. Specifically, Dr. Michael Herron of Dartmouth College testified that, “changes to early voting hours that reduce pre-Election Day, Sunday voting opportunities should be expected to disproportionately affect Black voters” and that, if a state were to eliminate Sunday early voting, “the cost of voting for Black voters would disproportionately increase compared to White voters given the relatively heavy use of Sunday early voting by Black voters.”<sup>34</sup> However, permitting early voting opportunities without providing meaningful access to them amounts to essentially no access. In discussing access for Native American voters, Professor Patty Ferguson-Bohnee, Director of the Indian Legal Clinic at the Sandra Day O’Connor College of Law testified that, “[e]arly voting opportunities located hours away effectively amount to no access to in-person early voting in light of the practical effects of requiring voters to travel such distances.”<sup>35</sup> Opportunities to vote such as in-person early voting, mail-in voting, curbside and drive-thru voting, or the ability to return a voted mail-in ballot at a drop box have all been used with increasing frequency by minority voters, making them a target for suppressive cutbacks and restrictions by state legislatures that will disproportionately burden those same minority voters.

#### **(6) Changes to methods of election, jurisdictional boundaries, and redistricting**

impact whether voters can elect candidates that reflect their voices and communities. Discriminatory redistricting, vote dilution, changing of jurisdictional boundaries, and changes to methods of election have all been utilized throughout American elections — from local school board contests to Congressional races — to dilute growing voting power in minority communities. The country is entering the first redistricting cycle without the protections of the Voting Rights Act in more than a half century. According to a 2018 U.S. Commission on Civil Rights report on minority voting rights access, “overall data show that there have been over 3,000 changes submitted due to redistricting in every 10-year cycle since the 1965 VRA was enacted.”<sup>36</sup> Without VRA protections, it can take years of expensive, time consuming litigation to rectify these discriminatory practices, all while elections are conducted under district maps and voting structures that are later found to be unlawful. Evidence and testimony presented to the Subcommittee clearly illustrated that these practices are enacted with discriminatory effect and intent.

Each of the chapters that follows details the evidence gathered by the Subcommittee on each of these practices—clearly demonstrating the findings of the Subcommittee that each warrants a heightened level of scrutiny and attention from Congress to ensure every American has equal, equitable access to the ballot.

The increase in voter turnout in both the 2018 and 2020 elections has not been met with celebration in statehouses across the country but has instead been met with backlash and

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<sup>34</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot:* Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Michael Herron at 19.

<sup>35</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting:* Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Patty Ferguson-Bohnee at 12.

<sup>36</sup> U.S. Comm'n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at 249, citing U.S. DEP'T OF JUSTICE, *Voting Changes Enacted or Administered by Any State Official Require Section 5 Review*, <https://www.justice.gov/crt/what-must-be-submitted-under-section-5>.

false claims of fraud—claims that are being used to justify voter suppression and the passage of laws that will disenfranchise minority voters. Investigations have repeatedly found no evidence of widespread fraud in American elections. Fraud in American elections is vanishingly rare. A person is more likely to be struck by lightning than to commit voter-impersonation fraud.<sup>37</sup> Other analyses found just 31 credible instances of impersonation fraud from 2000 to 2014, out of more than one billion ballots cast.<sup>38</sup>

In 2021, our democracy is under attack. According to the Brennan Center for Justice, as of July 14, 2021, lawmakers had introduced more than 400 bills in 49 states to restrict the vote—at least four times the number of restrictive bills introduced just two years prior. To date, at least 18 states have enacted new laws containing provisions that restrict access to voting.<sup>39</sup>

June 2021 marked the eighth anniversary of the *Shelby County* decision. That decision unleashed a torrent of voter suppression bills, many in previously covered jurisdictions, which continues today. Congress has the power—a power the U.S. Supreme Court has called “paramount” for 142 years<sup>40</sup>—and duty to act. As detailed in this report, there is much work to be done.

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<sup>37</sup> *The Myth of Voter Fraud*, BRENNAN CENTER FOR JUSTICE (Mar. 20, 2021), [The Myth of Voter Fraud | Brennan Center for Justice](#).

<sup>38</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021); written testimony of Michael Waldman at 6; *see also Debunking the Voter Fraud Myth*, BRENNAN CENTER FOR JUSTICE (Jan. 31, 2017), [Debunking the Voter Fraud Myth | Brennan Center for Justice](#).

<sup>39</sup> *Id.* at 4.

<sup>40</sup> *The Elections Clause: Constitutional Interpretation and Congressional Exercise*: Hearing Before the Comm. on House Admin., 117<sup>th</sup> Cong. (2021), written testimony of Daniel Tokaji at 1.

# CHAPTER ONE

## *Introduction and the History of Discrimination in Voting*

### AMERICA'S LONG HISTORY OF DISCRIMINATING IN VOTING

Since the Founding, Americans have not enjoyed equal access to the ballot. At her opening, the Declaration of Independence said “all men are created equal”<sup>41</sup>—yet enslaved persons, indentured servants, Native Americans, and women were all denied the right to vote.

The Thirteenth, Fourteenth, Fifteenth, Nineteenth, Twenty-third, Twenty-fourth, and Twenty-sixth Amendments all expanded access to the franchise not previously experienced by millions of Americans despite the promise of equality. This expansion did not come without bitter divides and opposition. The Thirteenth<sup>42</sup>, Fourteenth<sup>43</sup>, and Fifteenth<sup>44</sup> Amendments—known collectively as the Reconstruction Amendments—expanded access to the ballot for millions of Black Americans in the post-Civil War era, and gave Congress the power to enforce the rights granted in these Amendments through appropriate legislation.

Yet, while the immediate post-Civil War era brought about greater political representation for Black Americans, following the electoral crisis of 1876, former Confederates and their sympathizers seized control of southern state governments by brutally suppressing Black voters and eliminating the power of the Reconstruction Republican Party. By the 1890s, suppression tactics led to most African Americans having either been barred from or abandoned electoral politics as violence and economic reprisals became a constant threat to political participation and segregation was legalized.<sup>45</sup> Southern legislators passed laws such as poll taxes, grandfather clauses, literacy tests, and felon disenfranchisement, with the explicit intent of removing Black voters from the rolls.<sup>46</sup>

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41 U.S. Declaration of Independence (July 4, 1776), National Archives, transcription available at <https://www.archives.gov/founding-docs/declaration-transcript>.

42 U.S. Const. amend. XIII, sec. 1.

“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

43 U.S. Const. amend. XIV, sec. 1.

“All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

44 U.S. Const. amend. XV, sec. 1.

“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”

45 *The Negroes' Temporary Farewell: Jim Crow and the Exclusion of African Americans from Congress, 1887–1929*, History, Art, & Archives, U.S. House Of Representatives, <https://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Essays/Temporary-Farewell/Introduction/>.

46 *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Gilda Daniels at 4.

Indeed, the same barriers existed for Native Americans. In 1884, the Supreme Court held in *Elk v. Wilkins* that the Fourteenth Amendment did not provide citizenship to Native Americans.<sup>47</sup> Not until passage of the Indian Citizenship Act in 1924 did most Native Americans gain full citizenship and voting rights without undermining or negating their right to remain a member of their tribe.<sup>48,49</sup> Despite passage of the Act and subsequent passage of the Nationality Act of 1940, many states continued to deny Native Americans equal access to the ballot, claiming they were ineligible to vote because they were not residents of that state.<sup>50</sup> Not until 1957 and 1958 did Utah and North Dakota, respectively, become the last states to afford on-reservation Native Americans the right to vote.<sup>51</sup>

The Nineteenth Amendment granted women the right to vote when it was ratified in 1920.<sup>52</sup> The Twenty-third Amendment allowed residents of the District of Columbia to vote for President and Vice President (1961).<sup>53</sup> The Twenty-fourth Amendment outlawed poll taxes or any other tax to vote (1964),<sup>54</sup> and the Twenty-sixth Amendment lowered the voting age to 18 and banned the denial or abridgement of the vote based on age (1971).<sup>55</sup>

The U.S. government also systematically denied citizenship and voting rights to Asian Americans. Not until the repeal of the Chinese Exclusion Act in 1943 and the passage of the McCarran-Walter Act in 1952 were all Asian Americans granted the right to become citizens and therefore eligible to vote.<sup>56</sup>

<sup>47</sup> *Elk v. Wilkins*, 112 U.S. 94 (1884).

<sup>48</sup> Indian Citizenship Act, Pub. L. No. 68-175, 43 Stat 253, authorized the Secretary of the Interior to issue certificates of citizenship to Indians.

<sup>49</sup> James Tucker, Jacqueline De León, and Dan McCool, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, Native American Rights Fund (2020) at 11-12.

The state of South Dakota passed a law in 1903 that prevented Indians from voting while “maintaining tribal relations.” In North Dakota, the state Supreme Court in 1920 granted some Indians the right to vote because they “live the same as white people; they are law-abiding, do not live in tribes under chiefs; that they marry under the civil laws of the state the same as whites, and that they are Christians; that they have severed their tribal relations.”

<sup>50</sup> *Id.*

<sup>51</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Patty Ferguson-Bohnee at 2.

<sup>52</sup> U.S. Const. amend. XIX, sec. 1.

“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”

<sup>53</sup> U.S. Const. amend. XXIII.

“The District constituting the seat of government of the United States shall appoint in such manner as the Congress may direct: A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a state, but in no event more than the least populous state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.”

<sup>54</sup> U.S. Const. amend. XXIV.

“The right of citizens of the United States to vote in any primary or other election for President or Vice President for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.”

<sup>55</sup> U.S. Const. amend. XXVI.

“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”

<sup>56</sup> Terry Ao Minnis and Mee Moua, *50 Years of the Voting Rights Act: The Asian American Perspective*, Asian Americans Advancing Justice | AAJC (Aug. 4, 2015), <https://www.advancingjustice-aajc.org/sites/default/files/2016-09/50-years-of-VRA.pdf>.

Early in America’s founding, naturalization was limited to only “free White persons.” Two key Court cases from the 1920s – *Ozawa v. U.S.* and *U.S. v. Thind* – held that Asian immigrants were not free white people and therefore, ineligible for naturalized citizenship. Federal policy barred immigrants of Asian descent from becoming U.S. citizens... It was not until 1943

## A CONSTITUTIONAL RIGHT TO VOTE

*“But 56 years later, the shackles of white supremacy still restrict the full exercise of our rights and freedom to vote. For democracy to work for all of us, it must include all of us.”*

—Wade Henderson, Interim President &  
CEO, The Leadership Conference

To this day, scholars argue that the Constitution does not guarantee the right to vote as a positive right—that the amendments do not provide an affirmative grant but disallow the government from restricting the franchise based on protected criteria—race, sex, paying a poll tax, and age.<sup>57</sup> However, while the text of the Constitution does not explicitly provide for and protect the vote as a fundamental right, the Supreme Court has long recognized that voting is a fundamental right.<sup>58</sup>

Voting and equal, equitable access to the ballot are cornerstones of creating a true democracy. Justice Hugo Black, in *Wesberry v. Sanders*, stated that:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.<sup>59</sup>

Professor Guy-Uriel Charles of Duke Law School noted in his testimony before the Committee that, “since at least 1886, in *Yick Wo v. Hopkins*, the Supreme Court has recognized that voting is a fundamental right of citizens and that its availability is critical to sustaining representative government.”<sup>60</sup> In 1964, Chief Justice Earl Warren wrote, “[t]he right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of the representative government.”<sup>61</sup> More recently, Chief Justice John Roberts noted, “[t]here is no right more basic in our democracy than the right to participate in electing our political leaders.”<sup>62</sup>

## THE VOTING RIGHTS ACT, PRECEDENT, AND SHELBY COUNTY V. HOLDER

Despite the protections from racial discrimination in voting afforded in theory under the Reconstruction Amendments, for nearly 100 years after their passage, Black Americans were “systematically disenfranchised by poll taxes, literacy tests, property requirements, threats,

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with the repeal of the Chinese Exclusion Act, that persons of Chinese origin were granted the ability to naturalize. Most other Asians were granted the ability to naturalize by 1952 through the McCarran-Walter Act (Immigration and Nationality Act of 1952) and subsequent amendments in 1965.

57 *Strengthening American Democracy*: Hearing Before the Comm. on House Admin., 117<sup>th</sup> Cong. (2021), written testimony of Guy-Uriel E. Charles at 3.

58 *Id.* (citing to e.g., *Harper v. Virginia Board of Elections*, 363 U.S. 663 (1966)) (discussing the Court’s right to vote jurisprudence).

59 *Id.* at 4 (citing *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)).

60 *Id.*

61 *Id.* (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)).

62 *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 185 (2014).

and lynching.”<sup>63</sup> To address the systemic discrimination and barriers in voting, on August 6, 1965, President Lyndon B. Johnson signed the Voting Rights Act of 1965 into law.<sup>64</sup>

One of the pillars of the Civil Rights laws of the 1960s, the Voting Rights Act of 1965 (“VRA”) was enacted to address election laws and practices that discriminated on the basis of race and ethnicity. In the decades following its enactment, the VRA went a long way to addressing the widespread racial discrimination in voting. The VRA was designed to fight, “an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.”<sup>65</sup> Prior to the passage of the VRA, when the U.S. Department of Justice obtained favorable decisions striking down suppressive, discriminatory voting practices, states would merely enact new schemes to restrict access to the ballot for Black voters.<sup>66</sup>

The VRA placed a nationwide prohibition on states, or political subdivisions, from implementing voting qualifications or prerequisites, standards, practices, or procedures to, “deny or abridge the right of any citizen to vote on the basis of race or color.”<sup>67</sup> Originally set to expire five years after enactment, the VRA was subsequently amended and extended by Congress on a bipartisan basis several times. Congress continued to support the underlying policy of the Voting Rights Act while voting to amend, expand, and extend the law five times: in 1970, 1975, 1982, 1992, and 2006.

Each time, the law was reauthorized with overwhelming, bipartisan support.<sup>68</sup> Moreover, all of the multiple reauthorizations were signed into law by Republican Presidents. The 2006 reauthorization, the *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006* passed the House of Representatives overwhelmingly following introduction by Representative James Sensenbrenner, Jr.

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*“Democracy is not a state. It is an act, and each generation must do its part to help build what we called the Beloved Community, a nation and world society at peace with itself.”*

— John R. Lewis, Member of Congress  
(D-Georgia) (d. 2020)

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<sup>63</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*, Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Janai S. Nelson at 3-4.

<sup>64</sup> The Voting Rights Act of 1965 passed the House of Representatives on August 3, 1965 (328-74) and the Senate on August 4, 1965 (79-18).

<sup>65</sup> *Shelby County v. Holder*, 570 U.S. 529, 133 S. Ct. 2612, 2618 (2013) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 309).

<sup>66</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*, Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Janai Nelson at 5.

<sup>67</sup> Voting Rights Act of 1965, Pub. Law No. 89-110, Sec. 2.

“No voting qualifications or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”

<sup>68</sup> U.S. Comm'n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018), [https://www.usccr.gov/pubs/2018/Minority\\_Voting\\_Access\\_2018.pdf](https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf).

The 1970 reauthorization passed the House (272-132), the Senate (64-12), and was signed into law by President Richard Nixon. The 1975 reauthorization passed the House (341-70), the Senate (77-12), and was signed into law by President Gerald Ford. The 1982 amendments and reauthorization passed the House (389-24), the Senate (85-8), and was signed into law by President Ronald Reagan. The VRA Language Assistance Act of 1992 passed the House (237-125), the Senate (75-20), and was signed into law by President George H. W. Bush.

(R-Wisc.), passed the Senate unanimously, and was signed into law by President George W. Bush.<sup>69</sup>

Since the VRA's initial passage, and through the subsequent amendments and reauthorizations, the Supreme Court repeatedly affirmed Congress's authority to enact statutes that prohibit states and localities from imposing voting laws that intentionally discriminate on the basis of race or ethnicity.<sup>70</sup> In *South Carolina v. Katzenbach*, the Court held that the Voting Rights Act was, "a valid means for carrying out the commands of the Fifteenth Amendment."<sup>71</sup> The Court would later uphold the Voting Rights Act again in cases such as *City of Rome v. United States* (1980) and *Lopez v. Monterey County* (1999).<sup>72</sup> Furthermore, the Court has long upheld Congress's broad authority under the Constitution to pass laws and regulations governing federal elections.<sup>73</sup>

The Supreme Court has long affirmed the breadth of Congress's power to enact laws regulating elections. As Professor Guy-Uriel Charles noted in his testimony before the Committee, as early as 1880, the Supreme Court noted in *Ex parte Siebold* that Congress's Elections Clause power to regulate Congressional elections, "may be exercised as and when Congress sees fit to exercise it," and, "necessarily supersedes," conflicting state regulations.<sup>74</sup> Professor Charles further testified that, "[t]hus, although the Supreme Court has at times interpreted federalism as a constraint on Congressional power derived from the Fourteenth and Fifteenth Amendments, Congress' power to regulate federal elections is uniquely unencumbered by federalism constraints."<sup>75</sup>

Professor Franita Tolson of the University of Southern California Gould School of Law testified before the Committee that, despite the view by some that exercises of federal authority under the Elections Clause as a somewhat unwelcome intrusion on the states' authority to legislate with respect to federal elections, "Congress can disregard state sovereignty in enacting and enforcing legislation passed pursuant to the Elections Clause."<sup>76</sup> Additionally, Professor Daniel P. Tokaji of the University of Wisconsin Law School testified that the Court's, "most recent—and arguably most important—explications," of Congress's power came in *Arizona v. ITCA*, in which the Court noted that, "the usual presumption against federal pre-emption of state law does *not* apply to legislation enacted under the Elections Clause...While states historically enjoyed broad police powers over other matters, their

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69 *Id.* at 37.

70 *City of Rome v. United States*, 446 U.S. 156 (1980).

71 *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

72 *City of Rome v. United States*, 446 U.S. 156, 158 (1980); *Lopez v. Monterey Cty.*, 525 U.S. 266, 287 (1990).

73 U.S. Const., art. I, sec. 4.; see also *Strengthening American Democracy*: Hearing Before the Comm. on House Admin., 117<sup>th</sup> Cong. (2021), written testimony of Guy-Uriel E. Charles at 10.

74 *Strengthening American Democracy*: Hearing Before the Comm. on House Admin., 117<sup>th</sup> Cong. (2021), written testimony of Guy-Uriel E. Charles at 10 (citing *Ex parte Siebold*).

75 *Id.* at 10 (citing *see Arizona*, 570 U.S. at 9) (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997) and *Ex parte Siebold*), 100 U.S. 371, 392 (1880)) (internal quotations removed). See also, Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L.J. FORUM 171 (2019); Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 B.U. L. REV. 317 (2019).

76 *The Elections Clause: Constitutional Interpretation and Congressional Exercise*: Hearing Before the Comm. on House Admin., 117<sup>th</sup> Cong. (2021), written testimony of Franita Tolson at 1.

regulation of congressional elections has always been subject to congressional revision or reversal.”<sup>77</sup>

The Supreme Court has also long held that Congress’s power to enforce the Fourteenth and Fifteenth Amendments extends beyond intentional discrimination. In *City of Rome v. United States*, the Court considered a municipality’s challenge to the constitutionality of Section 5 of the VRA, to the extent that it authorized invalidation of a state or local election law based solely on evidence that the law had a discriminatory effect.<sup>78</sup> The Court rejected the municipality’s constitutional challenge, holding that Congress’s power to enforce the Reconstruction Amendments extended beyond prohibiting intentionally discriminatory voting laws.<sup>79</sup> The Court reasoned that Congress’s authority to enforce the Reconstruction Amendments is coextensive with its authority under the Necessary and Proper Clause, which empowers Congress to enact any law that is, “appropriate,” “adapted to carry out the objects,” of the Fourteenth or Fifteenth Amendment, and not prohibited by another provision in the Constitution.<sup>80</sup>

Applying that test, *City of Rome* made clear that, “under the Fifteenth Amendment, Congress may prohibit voting practices that have only a discriminatory effect.”<sup>81</sup> In particular, “under § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment [in that they are intentionally discriminatory], so long as the prohibitions attacking racial discrimination are ‘appropriate,’ as that term is defined in *McCulloch v. Maryland* and *Ex parte Virginia*.<sup>82</sup>

Despite decades of precedent that uphold Congressional power and the VRA,<sup>83</sup> in 2013, the Supreme Court struck down portions of the 2006 VRA reauthorization in *Shelby County v. Holder* (“Shelby County” or “Shelby”), leaving American voters vulnerable to tactics of suppression and discrimination.<sup>84</sup> In its ruling, the Court struck down Section 4(b) as outdated and not “grounded in current conditions.”<sup>85</sup> The Supreme Court ruled that Section 4(b)’s coverage formula violated implicit equal sovereignty principles in the Constitution because it treated states differently—requiring certain states and localities, but not others, to obtain preclearance—but relied on sometimes decades old data to justify that differential treatment.<sup>86</sup>

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<sup>77</sup> *The Elections Clause: Constitutional Interpretation and Congressional Exercise: Hearing Before the Comm. on House Admin.*, 117<sup>th</sup> Cong. (2021), written testimony of Daniel P. Tokaji at 4.

<sup>78</sup> *City of Rome v. United States*, 446 U.S. 156 (1980) at 173.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 175 (quoting *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879)).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 177.

<sup>83</sup> *The Elections Clause: Constitutional Interpretation and Congressional Exercise: Hearing Before the Comm. on House Admin.*, 117<sup>th</sup> Cong. (2021), written testimony of Franita Tolson at 2.

“In *Shelby County v. Holder*, the U.S. Supreme Court criticized the preclearance provisions of section 4(b) and 5 of the Voting Rights Act of 1965 (“VRA”) for, among other things, forcing a subset of states to solicit permission from the federal government to enact election laws that they would otherwise have the authority to implement. This intrusion imposed a significant and, in the Court’s view, unwarranted federalism cost that could not be justified by the Fourteenth and Fifteenth Amendments. However, the Court ignored that the Elections Clause stands as an additional source of authority, unconstrained by these federalism concerns, that can justify federal anti-discrimination and voting rights legislation.”

<sup>84</sup> *Shelby County v. Holder*, 570 U.S. 529, 133 S.Ct. 2612 (2013).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 550-51.

The Court found the data upon which Congress relied in reauthorizing the VRA—evidence dating to the 1960s and 1970s of differential registration rates between White and Black voters and the use of literacy tests to depress minority voting, for example—to be insufficient to meet that standard, particularly in light of documented improvements in minority voter registration rates and turnout.<sup>87</sup> By invalidating the coverage formula, *Shelby County* essentially rendered Section 5 inoperable, allowing previously covered states and localities to make changes to their voting laws without seeking preclearance from the Department of Justice.

At the same time the Court upheld the VRA, Chief Justice Roberts conceded that discrimination in voting still exists, writing, “[a]t the same time, voting discrimination still exists; no one doubts that.”<sup>88</sup> Despite this, Chief Justice Roberts’ majority opinion declared that the data before the Court undergirding the reauthorization of the VRA was outdated:

The question is whether the Act’s extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put it a short time ago, “the Act imposes current burdens and must be justified by current needs.”<sup>89</sup>

The Chief Justice did, however, expressly suggest that Congress may remedy this and restore the effect of the preclearance regime by updating the coverage formula, providing a roadmap for Congressional action:

Striking down an Act of Congress ‘is the gravest and most delicate duty that this Court is called on to perform.’ *Blodgett v. Holden*, 275 U. S. 142, 148 (1927) (Holmes, J., concurring). We do not do so lightly. That is why, in 2009, we took care to avoid ruling on the constitutionality of the Voting Rights Act when asked to do so, and instead resolved the case then before us on statutory grounds. But in issuing that decision, we expressed our broader concerns about the constitutionality of the Act. Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare §4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.

Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in §2. We issue no holding on §5 itself, only on the coverage formula. Congress may draft another formula based on current conditions. Such a formula is an initial prerequisite to a determination that exceptional conditions still exist justifying such an ‘extraordinary departure from the traditional course of relations between the States and the Federal Government.’ *Presley*, 502 U.S., at 500–501. Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.<sup>90</sup>

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<sup>87</sup> *Id.* at 536 (quoting *Northwest Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

<sup>88</sup> *Id.* at 535.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 557.

Without the full protections of the VRA, states are free to implement discriminatory voting laws without preemptive Justice Department oversight. While Section 2 of the VRA remains an avenue for combatting discriminatory voting laws in the courts, Section 2 lawsuits are reactive, filed only after laws have been enacted, often take years and extensive resources to litigate, and all while elections may be conducted under restrictions later found to be unlawful. Prior to the Supreme Court’s decision in *Shelby County*, nine states were covered by statewide preclearance requirements under the VRA’s coverage formula in Section 4(b) and the preclearance regime of Section 5. Preclearance required the states and localities captured under the coverage formula to seek and receive administrative approval from the U.S. Department of Justice (“DOJ” or “Justice Department”) or judicial review by the U.S. District Court for the District of Columbia prior to making changes to their voting laws.<sup>91</sup> At the time *Shelby County* was decided, Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia were the states covered as a whole.<sup>92</sup> Additionally, counties in California, Florida, New York, North Carolina, South Dakota, and townships in Michigan, were previously covered under Section 5 though each state itself was not covered as a whole.<sup>93</sup> Throughout the history of the VRA, counties have also “bailed out” of coverage—meaning they were once subject to the preclearance regime of Section 5, but successfully obtained a declaratory judgment under Section 4 and thus were no longer subject to preclearance.<sup>94</sup>

Hours after *Shelby County* was decided, states moved to enact restrictive voting laws. Texas revived a previously blocked voter ID law. Within days, Alabama announced it would move to enforce a photo ID law it had previously refused to submit to the DOJ for preclearance. Within months, New York broke from past practices and declined to hold special elections to fill 12 legislative vacancies, denying representation to 800,000 voters of color.<sup>95</sup>

Less than two months after the Supreme Court struck down the preclearance provisions, North Carolina state legislators wasted no time passing an omnibus “monster law.”<sup>96</sup> State Senator Tom Apodaca (then-Chairman of the North Carolina Senate Rules Committee) said the State did not want the “legal headaches” of having to go through preclearance if it was not necessary to determine which portions of the proposal would be subject to federal scrutiny, “so, now we can go with the full bill,” he added. He predicted at the time that an omnibus voting bill would surface in the Senate the next week that could go beyond voter ID to include issues such as reducing early voting, eliminating Sunday voting, and barring same-day voter registration.<sup>97</sup>

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<sup>91</sup> Civil Rights Division, *About Section 5 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE (updated Sept. 11, 2020), <https://www.justice.gov/crt/about-section-5-voting-rights-act>.

<sup>92</sup> Civil Rights Division, *Jurisdictions Previously Covered by Section 5*, U.S. DEP’T OF JUSTICE (last updated Sept. 11, 2020), <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>.

<sup>93</sup> *Id.*

<sup>94</sup> For examples see: Civil Rights Division, *Section 4 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE (updated May 5, 2020), <https://www.justice.gov/crt/section-4-voting-rights-act>.

<sup>95</sup> *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019); written testimony of Deuel Ross at 4.

<sup>96</sup> William Wan, *Inside the Republican creation of the North Carolina voting bill dubbed the ‘monster’ law*, The Washington Post (Sept. 2, 2016), [https://www.washingtonpost.com/politics/courts\\_law/inside-the-republican-creation-of-the-north-carolina-voting-bill-dubbed-the-monster-law/2016/09/01/79162398-6adf-11e6-8225-fbb8a6fc65bc\\_story.html](https://www.washingtonpost.com/politics/courts_law/inside-the-republican-creation-of-the-north-carolina-voting-bill-dubbed-the-monster-law/2016/09/01/79162398-6adf-11e6-8225-fbb8a6fc65bc_story.html).

<sup>97</sup> NC Voter Bill Moving Ahead with Supreme Court Ruling, WRAL.COM (June 25, 2013), <https://www.wrал.com/nc-senator-voter-idbill-moving-ahead-with-ruling/12591669/>.

This pattern continued, and in 2016, 14 states had enacted new voting restrictions for the first time in a presidential election, including previously covered states such as Alabama, Arizona, Mississippi, South Carolina, Texas, and Virginia.<sup>98</sup> In 2017, two additional states, Arkansas and North Dakota, enacted voter ID laws.<sup>99</sup> In 2018, Arkansas, Indiana, Montana, New Hampshire, North Carolina, and Wisconsin enacted new restrictions on voting, ranging from restrictions on who can collect absentee ballots, to cuts to early voting, restrictions on college students, and enshrining voter ID requirements in a state constitution.<sup>100</sup> In 2019, Arizona, Florida, Indiana, Tennessee, and Texas enacted new restrictions.<sup>101</sup> As of the end of 2019, the Brennan Center for Justice (“Brennan Center”) reported that, since 2010, 25 states had enacted new voting restrictions, including strict photo ID requirements, early voting cutbacks, and registration restrictions.<sup>102</sup> A new wave of voter suppression bills has emerged in the wake of the 2020 general election, with restrictive voting bills being signed into law in at least 18 states at the time of this writing.

Despite the Court’s decision, several key provisions of the VRA remain in place. For example, the language access requirements contained in Sections 4(e), 4(f)(4), 203, and 208 remain intact. Section 2 is also a key enforcement mechanism for the DOJ and outside litigators to protect voting rights nationwide. Section 2 of the VRA applies a nationwide prohibition against the denial or abridgment of the right to vote on the basis of race or color and was later amended to include language minorities.<sup>103</sup>

Since the *Shelby County* decision invalidated the coverage formula for preclearance, voting rights groups, litigators, and the Department of Justice are left to file lawsuits arguing that voting changes would discriminatorily reduce minority citizens’ ability to cast a ballot or elect candidates of their choice—a remedy that is in many ways inadequate to fully protect the right to vote. Voters and advocates are forced to reactively fight to protect the right to vote, rather than states and localities having to prove prior to implementation that their laws will not discriminate against protected classes of voters.

On July 1, 2021, the Supreme Court held in *Brnovich v. DNC* that Arizona’s laws restricting third-party ballot return and out-of-precinct voting were lawful and did not violate Section 2’s ban on discriminatory effect in voting, nor were they enacted with discriminatory

<sup>98</sup> *New Voting Restrictions in America*, BRENNAN CENTER FOR JUSTICE (last updated Nov. 19, 2019), <https://www.brennancenter.org/our-work/research-reports/new-voting-restrictions-america>.

“In 2016, the 14 states with new voting restrictions in place for the presidential election were: Alabama, Arizona, Indiana, Kansas, Mississippi, Nebraska, New Hampshire, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Virginia, and Wisconsin.”

<sup>99</sup> *Id.*

“In 2017, legislatures in Arkansas and in North Dakota passed voter ID bills, which governors in each state signed, and Missouri implemented a restrictive law that was passed by ballot initiative in 2016. (Texas also passed a new voter ID law, though its earlier strict voter ID law was partially in effect in 2016.) Georgia, Iowa, Indiana, and New Hampshire also enacted restrictions last year, in addition to laws that were on the books for previous elections.”

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *New Voting Restrictions in America*, BRENNAN CENTER FOR JUSTICE (last updated Nov. 19, 2019), <https://www.brennancenter.org/our-work/research-reports/new-voting-restrictions-america>.

<sup>103</sup> L. Paige Whitaker, *Statement for Hearing on “History and Enforcement of the Voting Rights Act of 1965,”* CRS Testimony TE10033, Testimony for Committee on Judiciary, Subcomm. on the Constitution, Civil Rights and Civil Justice (Mar. 12, 2019), (citing codified as amended at 52 U.S.C. §§ 10301, 10303(f) and Voting Rights Act Amendments of 1975, Pub. L. No. 94-73).

purpose.<sup>104</sup> In doing so, Justice Samuel Alito, writing for the majority, articulated an entirely new standard for reviewing Section 2 vote denial claims, weakening one of the last pillars of the VRA and fail-safes against discriminatory voting laws. Justice Alito held that, “the mere fact that there is some disparity in impact,” is now no longer dispositive, but rather, “the size of the disparity matters.”<sup>105</sup> Further, Justice Alito provided that, “courts must consider the opportunities provided by a State’s entire system of voting when assessing the burden imposed by a challenged provision”—rather than evaluating the provision on its individual merits.<sup>106</sup> Finally, Justice Alito went a step further, stating that, “prevention of fraud” is a “strong and entirely legitimate state interest,” even if there is no evidence of fraud having ever occurred, and that rules that are supported by strong state interests are, “less likely to violate” Section 2.<sup>107</sup>

In writing for the dissent in *Brnovich*, Justice Elena Kagan admonished the majority for weakening a seminal statute and creating its own standard and set of guideposts where one did not exist in the statute. Justice Kagan stated:

Today, the Court undermines Section 2 and the right it provides. The majority fears that the statute Congress wrote is too “radical”—that it will invalidate too many state voting laws. So the majority writes its own set of rules, limiting Section 2 from multiple directions. Wherever it can, the majority gives a cramped reading to broad language. And then it uses that reading to uphold two election laws from Arizona that discriminate against minority voters... What is tragic here is that the Court has (yet again) rewritten—in order to weaken—a statute that stands as a monument to America’s greatness, and protects against its basest impulses.<sup>108</sup>

Justice Kagan argued that the majority had strayed far from the text of Section 2 in its ruling, its analysis permitting, “exactly the kind of vote suppression that Section 2, by its terms, rules out of bounds.”<sup>109</sup>

## THE SUBCOMMITTEE ON ELECTIONS INVESTIGATION OF CURRENT DISCRIMINATION IN VOTING

In exercising Congress’s authority and jurisdiction over federal elections, the Committee on House Administration (“Committee”) has broad jurisdiction under Rule X of the Rules of the House to oversee the administration of federal elections. In exercising that jurisdiction, Speaker of the House Nancy Pelosi (D-Calif.) and Committee Chair Zoe Lofgren (D-Calif.) reconstituted the Committee on House Administration’s Subcommittee on Elections (“Subcommittee”) at the outset of the 116<sup>th</sup> Congress.

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<sup>104</sup> *Brnovich v. DNC*, 594 U.S. \_\_\_\_ (2021).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* writing for the dissent.

<sup>109</sup> *Id.*

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*“If a single statute represents the best of America, it is the Voting Rights Act. It marries two great ideals: democracy and racial equality. And it dedicates our country to carrying them out...”*

*If a single statute reminds us of the worst of America, it is the Voting Rights Act. Because it was—and remains—so necessary.”*

— Justice Elena Kagan,  
*Brnovich v. DNC (dissent)*

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Subsequently, spanning the leadership of then-Subcommittee Chair Marcia L. Fudge (D-Ohio) and current Chair G. K. Butterfield (D-N.C.), the Subcommittee embarked during the 116<sup>th</sup> and 117<sup>th</sup> Congresses to hold more than a dozen hearings to collect the contemporaneous evidence and data called for by Chief Justice Roberts and the Court’s majority in *Shelby*.<sup>110</sup>

In building upon investigatory hearings conducted in the 116<sup>th</sup> Congress, in the 117<sup>th</sup> Congress the Subcommittee identified the practices with what appeared to be the most abundant evidence of discriminatory impact on minority voters and endeavored to examine those practices in greater detail.

Across the Subcommittee’s five hearings, the Subcommittee received testimony from more than 35 witnesses, gathering and examining evidence of ongoing discrimination in the election practices of: (1) voter list maintenance and voter purges; (2) voter identification and documentary proof-of-citizenship laws; (3) lack of access to multi-lingual voting materials and assistance; (4) polling place closures, consolidations, relocations, and long wait times; (5) restrictions on opportunities to vote; and (6) changes to method of elections, jurisdictional boundaries, and redistricting. Furthermore, the Subcommittee examined the state of voting rights enforcement and protection in the post-*Shelby County* era.

The practices examined are perennial barriers faced by voters. According to testimony from Marcia Johnson-Blanco of the Lawyers’ Committee for Civil Rights Under Law (“Lawyers’ Committee”), during the 2020 General Election cycle, the top issues raised through the organization’s nationwide, non-partisan voter protection program included, “questions and concerns about mail-in and absentee ballots, as well as voter ID and registration... Election Day also brought calls of polling place accessibility issues, and concerning calls complaining of voter intimidation and electioneering.”<sup>111</sup> The Subcommittee’s lengthy proceedings and examination revealed that each of the practices identified impose significant, discriminatory burdens on minority voters.

The evidence before the Subcommittee includes locality-and state-specific, as well as nationwide, studies demonstrating that the election practices examined impose a variety of discriminatory burdens, ranging from disproportionately decreased registration and

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<sup>110</sup> This report incorporates by reference the hearing records for the Texas listening session, the Georgia, Dakotas, North Carolina, Ohio, Florida, Alabama, and Arizona field hearings, and the Washington, D.C., summary hearing held by the Subcommittee on Elections in the 116<sup>th</sup> Cong., 1<sup>st</sup> Sess. (2019).

<sup>111</sup> *Voting in America: Ensuring Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021); written testimony of Marcia Johnson-Blanco at 5.

turnout among minority voters, disproportionately high costs to register and cast a ballot, disproportionately increased risk that a ballot will be thrown out, and a disproportionate dilution of voting power. The record also includes extensive testimony from litigators and voting rights practitioners who confront these discriminatory voting laws and practices on a regular and increasingly frequent basis in courtrooms, governmental proceedings, and on voting days.

As Debo Adegbile, Partner at Wilmer Hale, LLC and Member of the U.S. Commission on Civil Rights, noted in his testimony before the Subcommittee, the expansion of the franchise has routinely been met with resistance:

We currently stand at an inflection point, but it is not unprecedented. The Fifteenth Amendment’s expansion of the right to vote was met with the creation of poll taxes and literacy tests. The rise of minority voting power after the Voting Rights Act was met with the expansion of at-large elections. The National Voter Registration Act (i.e., the Motor Voter Law) and the narrow margin of the 2000 presidential election were answered by a wave of spurious voter ID laws. Now, record voter turnout, despite a pandemic, is almost predictably sparking renewed efforts to make it even harder to vote.<sup>112</sup>

While states have been enacting discriminatory, restrictive voting laws in the years since *Shelby County*, that effort has significantly increased in response to the largest voter turnout in 120 years experienced in the 2020 General Election.

According to the Brennan Center, as of July 14, 2021, lawmakers had introduced more than 400 bills in 49 states to restrict the vote.<sup>113</sup> This is at least four times the number of restrictive bills introduced just two years prior, with at least 18 states having enacted new laws containing provisions that restrict access to voting.<sup>114</sup> A Brennan Center report from May 2021 states that, “[t]he United States is on track to far exceed its most recent period of significant voter suppression – 2011. By October of that year, 19 restrictive laws were enacted in 14 states. This year, the country has already reached that level, and it’s only May.”<sup>115</sup>

Michael Waldman, President of the Brennan Center for Justice, noted in his testimony before the Subcommittee that these bills were introduced with the intention of rolling back voting rights, observing that, “[c]rucially, these are not backbenchers tossing a bill in the hopper in the hope of getting a good day on Twitter.”<sup>116</sup> Indeed, as of June 21, 2021, 17 states have enacted 28 new laws that restrict access to the vote.<sup>117</sup> Moreover, Mr. Waldman testified that

<sup>112</sup> *Voting in America: Ensuring Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021); written testimony of Debo P. Adegbile at 4.

<sup>113</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021); written testimony of Michael Waldman at 5.

<sup>114</sup> *Id.*

<sup>115</sup> *Voting Laws Roundup: May 2021*, BRENNAN CENTER FOR JUSTICE (May 28, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021>.

<sup>116</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021); written testimony of Michael Waldman at 4.

<sup>117</sup> *Voting Laws Roundup: May 2021*, BRENNAN CENTER FOR JUSTICE (May 28, 2021, updated June 21, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021>.

“[a]s in previous eras, these laws and proposals purport to be racially neutral,” yet, “[i]n fact, often they precisely target voters of color.”<sup>118</sup>

Congress has a long history of exercising its legislative authority and constitutional powers to legislate to protect access to the franchise. In the eight years since *Shelby County* was decided, Congress has failed to act on what has historically been a bipartisan endeavor—ensuring every American has an equal and equitable opportunity to cast a ballot and participate in democracy. As Justice Kagan notes in her dissent in *Brnovich*, “[i]ndeed, the problem of voting discrimination has become worse since that time—in part because of what this Court did in *Shelby County*.

Weaken the Voting Rights Act, and predictable consequences follow: yet a further generation of voter suppression laws.”<sup>119</sup>

This report and the record compiled by the Subcommittee illustrate the urgent need for action.

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*“We need to repair the damage being done to our democracy. We need to create lasting, durable safeguards that protect our most essential freedom... We need to ensure that this country lives up to its fundamental promise and highest ideals.”*

*— Eric H. Holder, Jr., Former Attorney General of the United States*

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<sup>118</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021); written testimony of Michael Waldman at 4.

<sup>119</sup> *Brnovich v. DNC*, 594 U.S. \_\_\_\_ (2021).

# CHAPTER TWO

## *Discriminatory Practices in Voting: An Overview*

### OVERVIEW

Since the Supreme Court decided *Shelby County v. Holder* in 2013, states across the country have enacted voting laws and election administration policies that restrict access to the ballot in a discriminatory and suppressive manner, one that disproportionately impacts minority voters.

Over the last two Congresses, the Subcommittee on Elections of the Committee on House Administration undertook an extensive fact-finding series of hearings to study and understand the extent to which all voters across the United States have access to, or face barriers to, the ability to cast their ballot freely and fairly. Tellingly, with respect to the voting and election administration practices examined by the Subcommittee, the variety of sources examined, and testimony gathered all point to the same conclusion—the record demonstrates that the election administration laws and practices at issue disproportionately burden minority voters, denying many the free and equal access to the vote guaranteed by Federal law and the Constitution.

During the 116<sup>th</sup> Congress, the Subcommittee cast a wide evidentiary net, examining all manner of election administration and voting laws to identify which, if any, practices discriminate against minority voters. In doing so, the Subcommittee held eight hearings and a listening session, called more than 60 witnesses, gathered several thousand pages of testimony, documents, and transcripts, and received hours of oral testimony. Throughout those hearings, the Subcommittee found extensive evidence of numerous practices that do, or have the potential to, discriminate and suppress access to the ballot, culminating in a report released in November 2019 entitled *Voting Rights and Election Administration in the United States of America*.<sup>120</sup>

The barriers to voting faced by millions of Americans did not subside in the 2020 election—in many instances they were, in fact, exacerbated. During the first six months of the 117<sup>th</sup> Congress, building upon the record built in the 116<sup>th</sup> Congress, the Subcommittee on Elections, under the leadership of Chairman G. K. Butterfield (D-N.C.) identified a key subset of issues explored in the prior Congress that exhibited the most substantial evidence of disproportionate and discriminatory impact on voters, particularly minority voters, for further, in-depth examination.

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<sup>120</sup> Staff of Subcomm. on Elections, H. Comm. on H. Admin., 116<sup>th</sup> Cong., REPORT ON VOTING RIGHTS AND ELECTION ADMINISTRATION IN THE UNITED STATES OF AMERICA, (Comm. Print 2019) (incorporated by reference for the purposes of this report and record; testimony and evidence contained in the prior report may also be incorporated throughout this report), available at [https://cha.house.gov/sites/democrats.cha.house.gov/files/documents/Voting%20Rights%20and%20Election%20Administration%20in%20America\\_ONLINE\\_11-18-2019.pdf](https://cha.house.gov/sites/democrats.cha.house.gov/files/documents/Voting%20Rights%20and%20Election%20Administration%20in%20America_ONLINE_11-18-2019.pdf).

Over the course of five hearings, the Subcommittee conducted a substantive examination of the issues of: (1) discriminatory voter list maintenance practices and voter purges; (2) the discriminatory impact of voter ID and documentary proof-of-citizenship requirements; (3) the ongoing lack of access to multi-lingual voting materials and assistance; (4) the disparate impact of polling place closures, consolidations, relocations, and wait times at the polls; (5) restrictions on additional opportunities to vote; and (6) changes to methods of election, jurisdictional boundaries, and redistricting. In concluding the evidence gathering process, the Subcommittee examined the national landscape of voting rights in America in the eight years since the Supreme Court struck down one of the key pillars of the VRA.

Importantly, the evidence detailed in this report is “current,” as called for by Chief Justice Roberts and the Court’s majority in *Shelby*. This report examines a substantial body of evidence, the vast majority of which derives from elections and legislative sessions conducted in the last 10 years, with much of the evidence relating to elections occurring within the years post-*Shelby County*.

Over the course of testimony received from more than 35 witnesses and numerous hours of hearings, not only did the Subcommittee find substantial evidence that the election administration and voting practices examined throughout the hearings and in this report have a discriminatory effect on minority voters, but Members also found substantial evidence that there is a significant risk these discriminatory effects are the product of a discriminatory purpose. The extensive evidence recounted throughout this report, that the burdens of the election administration laws and practices, “bears more heavily on one race than another,” is illustrative of the laws’ and practices’ discriminatory purpose.<sup>121</sup> Additionally, as is noted in the discussion of some voting laws and practices later in this report, courts have looked at whether voting is “racially polarized,” which provides a controlling party disfavored by minority voters with, “an incentive for intentional discrimination in the regulation of elections” in determining when a practice is discriminatory and have found some of the practice examined by the Subcommittee to fit this set of circumstances.<sup>122</sup>

However, consistent with the Court’s admonition that Congressional factfinders must consider a variety of facts and circumstances in determining whether a law had its genesis in its discriminatory purpose, the Subcommittee looked beyond evidence of solely discriminatory effect in finding that there is a high risk these laws and practices are attributable to a discriminatory purpose. The background and context of many of the laws were suggestive of a discriminatory purpose. Many were enacted in the immediate or near aftermath of the *Shelby County* decision on party-line votes in previously covered jurisdictions with a well-documented history of racially polarized voting—others had already been rejected by the Department of Justice under the Section 5 preclearance regime.

Further, public officials and election administrators made troubling statements regarding some of the laws and practices at issue that bear the hallmarks of discriminatory purpose. The

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<sup>121</sup> *Shelby County v. Holder*, 570 U.S. 529 (2013) (quoting *Washington v. Davis*, 426 U.S. at 242)

<sup>122</sup> *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016) (citing H.R. Rep. No. 109-478, at 35).

Subcommittee also found evidence that some states and localities knew the laws would have discriminatory effects, but enacted them nevertheless, without including safeguards to protect the interests and rights of minority voters, as is illustrated in some of the examples discussed throughout this report. Additionally, states and localities provided unsupported or pretextual race-neutral justifications for many of the laws and practices. Several of the laws and practices were enacted just as minority groups disproportionately burdened by the voting laws or practices were gaining political influence.

The Subcommittee is not alone in finding that there is a significant risk that the laws and practices discussed in this report pose a high risk of being enacted for a discriminatory purpose. Based on some of the evidence described above and throughout this report, courts have found several of these laws were enacted with discriminatory intent or otherwise violated Federal law or the Constitution.

Section 2 of the Voting Rights Act has proved a powerful, but inadequate tool for protecting the right to vote and access to the ballot in the post-*Shelby* era. Section 2 authorizes private actors and the Department of Justice to challenge discriminatory voting practices in the federal courts.<sup>123</sup> As Janai Nelson, Associate Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. (“NAACP Legal Defense Fund” or “LDF”) stated in testimony before the Subcommittee:

Section 2 applies nationwide and places the burden on voters harmed by voting discrimination to bring litigation to challenge a law that has discriminatory results and/or discriminatory purpose. Section 2’s ‘permanent, nationwide ban’ on racially discriminatory dilution or denial of the right to vote is now the principal tool under the VRA to block and remedy these new discriminatory measures.<sup>124</sup>

Ms. Nelson testified that, “there have been at least nine federal court decisions finding that states or localities enacted racially discriminatory voting laws or practices intentionally, for the purpose of discriminating against Black voters, Latino voters, or other voters of color.”<sup>125</sup> Ms. Nelson testified further that, “litigation is slow and costly—and court victories may come only after a voting law or practice has been in place for several election cycles.”<sup>126</sup> The parties engaged in litigation often spend millions of dollars litigating these cases, they take up significant judicial resources, and the average length of Section 2 cases is two to five years.<sup>127</sup>

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<sup>123</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*, Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Janai S. Nelson at 6.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 11-12, citing See, e.g., *People First of Ala. v. Merrill*, 2020 WL 5814455 (N.D. 2020); *Jones v. Jefferson County Board of Education*, 2019 WL 7500528 (N.D. Ala. 2019); *Stout v. Jefferson County Board of Education*, 882 F.3d 988 (11th Cir. 2018); *Allen v. City of Evergreen*, 2014 WL 12607819 (S.D. Ala. 2014); *Democratic National Committee v. Hobbs*, 948 F.3d 989 (9th Cir. 2020); *Michigan State A Philip Randolph Institute v. Johnson*, 326 F. Supp. 3d 5323 (E.D. Mich. 2019); *Holmes v. Moore*, 840 S.E.2d 244 (2020); *North Carolina NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016); *Perez v. Abbott*, 250 F.Supp.3d 123 (W.D. Tex. Apr. 20, 2017); *Perez v. Abbott*, 253 F.Supp.3d 864 (W.D. Tex. May 2, 2017); *Veasey v. Abbott*, 265 F.Supp.3d 684 (S.D. Tex. 2017); *Patino v. City of Pasadena*, 230 F.Supp.3d 667 (S.D. Tex. 2017).

<sup>126</sup> *Id.* at 6.

<sup>127</sup> *Id.* at 24.

While court cases are ongoing, numerous elections for the Presidency, Congress, state, and local government seats may have come and gone. Thomas Saenz, President and General Counsel of the Mexican American Legal Defense and Educational Fund (“MALDEF”) stated in his testimony that, “[t]here is simply no way that non-profit voting rights litigators, even supplemented by the work of a reinvigorated Department of Justice Civil Rights Division, could possibly prevent the implementation of all of the undue ballot-access restrictions and redistricting violations that are likely to arise in the next two years.”<sup>128</sup>

The evidence is clear: lawsuits filed under Section 2 and other provisions of law and the Constitution cannot and do not substitute for proactive protections of voting rights and cannot serve as the sole vanguard against discriminatory voting and election administration practices. Additionally, the Supreme Court’s recent decision in *Brnovich v. DNC* likely makes it harder for voting rights litigators and the Department of Justice to protect the right to vote through Section 2 litigation.

The November 2020 general election saw record-setting voter turnout, with over 158 million ballots cast and the highest turnout as a percent of the voting eligible population in 120 years.<sup>129</sup> While some may cite recent voter registration and voter turnout numbers as alleged examples and evidence that the effects of *Shelby* have been minimal,<sup>130</sup> those numbers alone do not tell the whole story. For example, Dr. Matt Barreto of the UCLA Latino Policy and Politics Initiative stated in testimony before the Subcommittee that, “[s]ingular focus on turnout without centralizing the real impact of such burdens on access to the franchise is one-dimensional, operating within the subtext of racial power to reproduce the inequalities that demand the attention of political scientists in the first place.”<sup>131</sup> As the evidence before the Subcommittee clearly demonstrates, record turnout, and voter turnout generally, does not discredit or discount the existence of barriers to accessing the franchise.

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*“North Carolina remains the most active battlefield in this unending war for access to the ballot box, where the “Southern strategy” remains ever visible and effective, where politics are used as a proxy for race and embolden acts taken to restrict access to voting, and where electoral success by voters of color is met with voter suppression.”*

—Allison Riggs, Co-Executive Director,  
Southern Coalition for Social Justice

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<sup>128</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*, Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Thomas A. Saenz at 5.

<sup>129</sup> *Voting in America: Ensuring Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Debo P. Adegbile at 5.

<sup>130</sup> For example, Komisarchik and White, *Throwing Away the Umbrella: Minority Voting after the Supreme Court’s Shelby Decision*, Preliminary Draft (July 8, 2021). The authors note in their conclusion that localities have indeed taken advantage of the *Shelby* decision to implement voting changes that would not have been allowed under preclearance, that even this examination is a short-term analysis and preliminary investigation, and make further note that any negative effects of voting changes may have been swamped by counter-mobilization efforts or public backlash against perceived threats to voting rights.

<sup>131</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Multi-Lingual Support to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Matt Barreto at 4.

Additionally, state legislatures across the country have responded to the increase in voter participation not with more or sustained access to the ballot, but with false claims of fraud, election irregularities, and perpetuation of the “Big Lie” that the 2020 election was somehow rigged and stolen. The ongoing epidemic of misinformation and disinformation in our elections does not only polarize the electorate and fuel attempts to legislate voter suppression, but it also targets and suppresses minority votes. As Spencer Overton, President of the Joint Center for Political and Economic Studies testified before the Subcommittee in 2020, the disinformation targeted at Black voters, for example, on social media platforms in the 2016 election cycle continued in the 2020 cycle.<sup>132</sup> Mr. Overton testified that both foreign and domestic actors, “used online disinformation to target and suppress Black votes.”<sup>133</sup> Additionally, a report from NPR in the final days of the 2020 election found that Black and Latino voters were flooded with disinformation in the final days of the 2020 election with an unmistakable intent to depress turnout among minority voters.<sup>134</sup>

The spread of mis- and disinformation only continued with false claims of unlawful ballots being cast and widespread fraud—much of which was alleged to be in areas where large numbers of ballots were cast by minority voters. These claims have all been repeatedly disproven, yet states are using them as false pretenses to push forward an onslaught of new voting laws designed to make it harder for voters to participate in future elections, laws that will disproportionately and discriminatorily impact the ability of minority voters to cast a ballot.

As Wade Henderson, Interim President and CEO of the Leadership Conference on Civil and Human Rights (“The Leadership Conference”) testified:

The assault on our freedom to vote has only grown more dire. After historic turnout, politicians peddled lies, tried to discount the votes of communities of color, and attempted to override the will of the people. . . . Now they have doubled down on attempts to reshape the electorate for their own gain. . . . These restrictions disproportionately burden voters of color. They resemble the very strategies that led Congress to adopt the Voting Rights Act in the first place.<sup>135</sup>

The evidence before the Subcommittee is conclusive—the practices discussed below, and the manner in which they are implemented, are wielded with both discriminatory intent and effect, unlawfully erecting barriers to the ballot for minority voters across the country. The voting discrimination acknowledged by Chief Justice Roberts in *Shelby* does still exist. It is the conclusion of the Subcommittee’s hearings and this report that these practices warrant stricter protections to ensure every voter has unfettered access to the ballot promised to them under the Constitution and Federal law.

<sup>132</sup> *Voting Rights and Election Administration: Combatting Misinformation in the 2020 Election*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2020), written testimony of Spencer Overton at 1-2.

<sup>133</sup> *Id.* at 4.

<sup>134</sup> Shannon Bond, *Black and Latino Voters Flooded With Disinformation In Election’s Final Days*, NPR (Oct. 30, 2020), <https://www.npr.org/2020/10/30/929248146/black-and-latino-voters-flooded-with-disinformation-in-elections-final-days>.

<sup>135</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), testimony of Wade Henderson, hearing transcript at 75.

# CHAPTER THREE

## *Voter List Maintenance Practices and the Purguing of Eligible Voters*

### BACKGROUND

Voter purging is often performed under the guise of routine voter list maintenance. Some argue that opponents of voter purges are preventing state and local election officials from performing necessary, mandated list maintenance. Proponents of voter purging often raise the specter of deceased persons or voters who have moved remaining on the rolls, of “bloated” voter rolls, or insidious claims of non-citizens being on the rolls, leading to voter fraud. However, there is no credible evidence of widespread voter fraud in American elections. For example, a comprehensive analysis published by the *Washington Post* found only 31 credible instances of voter fraud between 2000 and 2014—out of one billion ballots cast.<sup>136</sup>

List maintenance is the law of the land and the process by which state and local governments remove ineligible voters from their voting rolls. The National Voter Registration Act (“NVRA”), or “motor voter” law, is the principal federal statute governing state maintenance of voter registration rolls.<sup>137</sup> The NVRA was signed into law on May 20, 1993, by President Bill Clinton, following decades of efforts to establish a national voter registration system to address low voter turnout and increase voter registration opportunities that began soon after passage of the VRA in 1965.<sup>138</sup> Enacted pursuant to Congress’s authority under the Elections Clause, the NVRA governs voter registration procedures for federal elections. Nevertheless, nearly all states use the NVRA-prescribed process for maintaining their voter rolls for both state and federal elections.

In addition to establishing voter registration procedures, the NVRA provides that “each State shall... conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of—(A) the death of the registrant; or (B) a change in the residence of the registrant....”<sup>139</sup> The NVRA provides that

<sup>136</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*, Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Michael Waldman at 7 (citing Justin Levitt, *A comprehensive investigation of voter impersonation finds 31 credible incidents out of one billion ballots cast*, WASH. POST (Aug. 6, 2014) <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/>).

<sup>137</sup> NVRA requirements apply to 44 states and the District of Columbia. Six states (Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming) are exempt from the NVRA because, on and after August 1, 1994, they either had no voter-registration requirements or had election-day voter registration at polling places with respect to elections for federal office. The territories are also not covered by the NVRA (Puerto Rico, Guam, Virgin Islands, and American Samoa). See Civil Rights Division, *The National Voter Registration Act of 1993 (NVRA)*, U.S. DEP’T OF JUSTICE (updated Mar. 11, 2020), <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra>.

<sup>138</sup> Royce Crocker, *The National Voter Registration Act of 1993: History, Implementation, and Effects*, Congressional Research Service (R40609) (updated Sept. 18, 2013) (archived).

<sup>139</sup> 52 U.S.C. § 20507(a)(4). The statute also authorizes states to remove a voter registration roll for mental incapacity or criminal conviction. For the Department of Justice’s summary of NVRA’s voter registration list maintenance provisions, visit <https://www>.

any, “program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter roll for elections for Federal office” must meet two requirements. First, the program or activity must be, “uniform, nondiscriminatory, and in compliance with the Voting Rights Act of 1965.”<sup>140</sup> Second, the program or activity must “not result in the removal of any person from the official list of voters registered to vote in an election for Federal office by reason of the person’s failure to vote,” unless certain conditions are satisfied.<sup>141</sup>

The NVRA describes one form of “voter removal program[]” that states may use to remove voters (referred to in the statute as “registrants”) who have moved to an address outside of a jurisdiction.<sup>142</sup> In particular, states can use, “change-of-address information supplied by the Postal Service … to identify registrants whose addresses might have changed.”<sup>143</sup> A state may not remove a registrant from its voter rolls on grounds that the registrant has changed residence unless the registrant does one of two things: (1) confirms in writing that the registrant has changed residence to a place outside the jurisdiction or (2) it “appears” from information provided by the Postal Service that the registrant has moved to a different address in a different jurisdiction and a “notice” procedure is used to “confirm” that the registrant has, in fact, changed address to a new jurisdiction.<sup>144</sup> Under the notice procedure, a state must send a postage pre-paid and pre-addressed return card notifying the registrant of certain rights and obligations, and allowing a registrant to provide the state with the registrant’s current address.<sup>145</sup> If a registrant fails to respond to the notice, the state may, but is not required to, remove the registrant only if the registrant fails to vote in two federal elections after the date of the notice.<sup>146</sup>

A second federal law governing state voter registration lists—the Help America Vote Act of 2002 (“HAVA”), passed in the wake of the 2000 Presidential election—mandates the creation of statewide voter registration databases for all elections to federal office that include the “name and registration information of every legally registered voter in the State.”<sup>147</sup> HAVA requires that the database be created and maintained in a “uniform and nondiscriminatory manner.”<sup>148</sup> HAVA requires that state or local officials perform “list maintenance” on a “regular basis” in accordance with the provisions in the NVRA.<sup>149</sup> For the purposes of identifying felons and deceased individuals subject to removal, HAVA requires that the state coordinate with state agencies maintaining records on felony status and death.<sup>150</sup>

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[justice.gov/crt/national-voter-registration-act-1993-nvra](http://justice.gov/crt/national-voter-registration-act-1993-nvra).

140 *Id.* § 20507(b)(1).

141 *Id.* § 20507(b)(2).

142 *Id.* § 20507(c). The Postal Service-based process is one potentially compliant way for identifying registrants who may have changed their address to a different jurisdiction. However, NVRA does not bar jurisdictions from adopting other processes for identifying such registrants so long as they comply with the notice process set forth in NVRA in determining whether to remove the registrant.

143 *Id.* § 20507(c)(1)(A).

144 *Id.* § 20507(c)(1)(B).

145 *Id.* § 20507(d)(2).

146 *Id.* § 20507(d)(1)(A)(ii).

147 *Id.* § 21083(a)(1)(A).

148 *Id.*

149 *Id.* § 21083(a)(2)(A).

150 *Id.* § 21083(a)(2)(A)(ii).

HAVA further requires that states implement, consistent with NVRA, systems “of file maintenance that make[] a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters,” under which “registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.”<sup>151</sup>

When done improperly, voter list maintenance and voter purges disenfranchise otherwise eligible voters, use unreliable practices and data that disproportionately sweep in, and ultimately disenfranchise minority voters, often occurring too close to an election for a voter to correct the error if registration deadlines have passed.<sup>152</sup> Practices of voter purging have raised serious concerns in recent years.

## THE DISPROPORTIONATE AND DISCRIMINATORY BURDEN AND IMPACT OF LIST MAINTENANCE PRACTICES ON MINORITY VOTERS

Evidence received by the Subcommittee demonstrates that misconceived voter list maintenance efforts have erroneously sought to remove hundreds of thousands of properly registered voters and, in doing so, disproportionately burdened minority voters.

Following the *Shelby County* decision, several states, including those previously covered by Section 5 preclearance, have removed millions of registered voters from their voter rolls. As Michael Waldman, President of the Brennan Center for Justice, stated in his testimony before the Subcommittee, “abusive purges can remove duly registered citizens, often without their knowledge.”<sup>153</sup> Mr. Waldman further testified that, “purges have surged in states once subject to federal oversight under the VRA<sup>154</sup>… states once covered by Section 5 saw purges at a 40 percent higher rate than the rest of the country.”<sup>155</sup>

The Brennan Center reports that more than 17 million voters were removed from the rolls nationwide between 2016 and 2018.<sup>156</sup> In testimony during the 116<sup>th</sup> Congress, Mr. Waldman noted that the purge rate outpaced growth in voter registration (18 percent) or population (6 percent) and that the Brennan Center had calculated that two million fewer voters would have been purged between 2012 and 2016 if jurisdictions previously covered by Section 5 of the Voting Rights Act had purged their voter rolls at the same rate as other non-covered

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<sup>151</sup> *Id.* § 20183(a)(4)(A).

<sup>152</sup> *Voting in America: The Potential for Voter List Purges to Interfere with Free and Fair Access to the Ballot:* Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Sophia Lin Lakin at 2.

<sup>153</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting:* Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Michael Waldman at 3.

<sup>154</sup> *Id.* citing Jonathan Brater *et al.*, *Purges: A Growing Threat to the Right to Vote*, BRENNAN CENTER FOR JUSTICE (July 20, 2018) at 3-5, <https://www.brennancenter.org/publication/purges-growing-threat-right-vote>.

<sup>155</sup> *Id.* Kevin Morris, *Purge Rates Remain High*, BRENNAN CENTER FOR JUSTICE (Aug. 21, 2019), <https://www.brennancenter.org/our-work-analysis-opinion/voter-purge-rates-remain-high-analysis-finds>.

<sup>156</sup> *Id.*

jurisdictions.<sup>157</sup> Kevin Morris, Researcher with the Brennan Center, stated in his testimony before the Subcommittee that:

Put differently, this means that the end of the preclearance condition did not result in a one-time ‘catch-up’ of voter list maintenance, but rather ushered in a new era in which the voter list maintenance practices of formerly covered jurisdictions were substantially more aggressive than other demographically-similar jurisdictions that were not covered under the VRA. . . . Simply put, *Shelby County* allowed and effected increased voter purges in counties with demonstrated histories of racially discriminatory voting rules.<sup>158</sup>

In several recent cases, states were found to have improperly sought to remove properly registered voters. For example, after the State of Wisconsin identified 341,855 registrants as potentially subject to removal on the basis of having moved, thousands of individuals showed up to vote in the following election at their address of registration, indicating that Wisconsin had improperly flagged such registrants as likely movers.<sup>159</sup> Joshua Kaul, Attorney General for the State of Wisconsin testified that, of the voters initially listed on the “movers report,” over 6,000 voters responded to the postcards sent out to the potential “movers” and therefore kept their registration active, however, many more were erroneously deactivated and left off the poll book even though they had not moved.<sup>160</sup> Attorney General Kaul further testified that, during the 2018 Spring Primary, Wisconsin Elections Commission staff reported that, “while available data from the DMV implied many had moved, some of the voters, in fact, had not moved,” and that “[o]verall, 12,133 [voters] were proactively reactivated by staff or were stopped from being deactivated due to these data discrepancies.”<sup>161</sup> A study of Wisconsin’s process found that at least four percent of the registrants who were identified as potential movers and who did not respond to a subsequent postcard cast a ballot at their address of registration, with minority registrants twice as likely as white registrants to do so.<sup>162</sup>

The State of Arkansas moved to purge nearly 8,000 voters from the rolls on grounds that they were ineligible to vote due to a felony conviction—in Arkansas, those who have been convicted of a felony lose their right to vote until their sentence is completed or they are pardoned.<sup>163</sup> In actuality, however, the list included a high percentage of voters who were indeed eligible and, in fact, some had never been convicted of a felony or had had their voting rights restored.<sup>164</sup>

<sup>157</sup> *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), written testimony of Michael Waldman at 3.

<sup>158</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Kevin Morris at 8.

<sup>159</sup> Gregory Huber et al., *The racial burden of voter list maintenance errors: Evidence from Wisconsin’s supplemental poll movers poll books*, 7 SCI. ADV. 3 (Feb. 17, 2021).

<sup>160</sup> *Voting in America: The Potential for Voter List Purges to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Josh Kaul at 1-2.

<sup>161</sup> *Id.*

<sup>162</sup> Gregory Huber et al., *The racial burden of voter list maintenance errors: Evidence from Wisconsin’s supplemental poll movers poll books*, 7 SCI. ADV. 3 (Feb. 17, 2021).

<sup>163</sup> Jonathan Brater, et al., *Purges: A Growing Threat to the Right to Vote*, BRENNAN CENTER FOR JUSTICE (2018) at 5, [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Purges\\_Growing\\_Threat.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf).

<sup>164</sup> *Id.*

Thomas Saenz of MALDEF noted in his testimony before the Subcommittee that, “MALDEF and others also had to challenge an attempt to purge thousands of naturalized Texans, who were targeted through Motor Vehicles data that the state knew were outdated and would not reflect recent naturalizations.”<sup>165</sup> Texas erroneously tried to remove tens of thousands of voters on grounds that they were non-citizens. Evidence subsequently showed that virtually all the registrants targeted by the effort were, in fact, citizens eligible to vote.<sup>166</sup>

Additionally, an analysis conducted by a non-partisan group found that, of the more than 300,000 registrants Georgia purged in 2019 for having changed residence, 63.3 percent still lived at the residence identified on the voter registration.<sup>167</sup> The analysis found the Georgia erroneously purged nearly 200,000 voters from its rolls.<sup>168</sup>

In many cases, the percentage of voters from racial or language minority groups subject to removal under these recent, large-scale, and often errant, voter roll purge efforts exceeded such groups’ representation in the overall population. For example, in 2012 the State of Florida created a list of 182,000 registrants potentially subject to purge on the grounds that the registrants were non-citizens. The percentage of registrants included in the list that were Hispanic (61 percent) substantially exceeded the percentage of Hispanics in Florida’s overall population (16 percent).<sup>169</sup> Litigation in the case of *Mi Familia Vota Education Fund v. Detzner* showed that this change should have been submitted for preclearance as a statewide change impacting formerly covered counties in Florida under Section 5.<sup>170</sup> NAACP LDF’s *Democracy Diminished* report noted that a 2018 report found that since 2016, Florida has purged more than seven percent of voters.<sup>171</sup>

Likewise, mailers initiating the Wisconsin voter purge effort were disproportionately sent to counties with disproportionately large Black and Latino populations.<sup>172</sup> According to Demos,

<sup>165</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong.* (2021); written testimony of Thomas A. Saenz at 3.

<sup>166</sup> *Voting in America: The Potential for Voter List Purges to Interfere with Free and Fair Access to the Ballot: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong.* (2021), written testimony of Sophia Lin Lakin at 8-10.

<sup>167</sup> Palast Investigative Fund, *Georgia Voter Roll Purge Errors* (Sept. 1, 2020) at 10-11, [https://www.acluga.org/sites/default/files/georgia\\_voter\\_roll\\_purge\\_errors\\_report.pdf](https://www.acluga.org/sites/default/files/georgia_voter_roll_purge_errors_report.pdf); see also ACLU of Georgia Releases the Palast Investigative Fund Report: The State Likely Removed Nearly 200,000 Citizens From the Voter Rolls Who Never Moved, ACLU Georgia (Sept. 2, 2020), <https://www.aclu.org/press-releases/aclu-georgia-releases-palast-investigative-fund-report-state-likely-removed-nearly>.

<sup>168</sup> *Id.*

<sup>169</sup> U.S. Comm’n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at 147-48.

The vast majority of voters on Florida’s 2012 purge list were people of color. The data in a federal complaint alleging Section 2 violations (based on Florida voter registration data) showed that 87 percent were voters of color: 61 percent were Hispanic (whereas 14 percent of all registered voters in Florida were Hispanic); 16 percent were Black (whereas 14 percent of all registered voters were Black); 16 percent were White (whereas 70 percent of registered voters were White); and 5 percent were Asian American (whereas only 2 percent of registered voters were Asian).

<sup>170</sup> *Id.* (citing *Mi Familia Vota Educ. Fund v. Detzner*, 891 F. Supp. 2d 1326, 1332-34 (M.D. Fla. 2012), <https://www.clearinghouse.net/chDocs/public/VR-FL-0168-0008.pdf>; see also *Allen*, 393 U.S. at 565, 567 (1969) (recognizing that Congress intended to give the VRA the “broadest possible scope” and that Section 5 reaches “subtle, as well as obvious” state laws that have the effect of or intent to disenfranchise minority voters); *Presley v. Etowah Cty. Comm’n*, 502 U.S. 491, 501 (1992) (reaffirming *Allen* and stating that “all changes in voting must be precleared” and that the “sphere” of Section 5 includes “all changes to rules governing voting”).

<sup>171</sup> *Democracy Diminished: State and Local Threats to Voting Post-Shelby County, Alabama v. Holder*, NAACP Legal Defense and Educational Fund, Inc. (as of Nov. 13, 2020) at 18.

<sup>172</sup> Shruti Banerjee & Stuart Naifeh, *How the Wisconsin Voter Purge Targets Black Voters*, DEMOS (Dec. 20, 2019), <https://www.demos.org/blog/how-wisconsin-voter-purge-targets-black-voters>.

while the Black voting population comprises only 5.7 percent of Wisconsin’s total electorate, “the highest concentrations of 2019 ERIC mailers were sent to areas that are home to the largest Black voting population in Wisconsin.”<sup>173</sup> Demos reported that over one-third of the mailers sent to voters on the 2019 ERIC list went to the two counties where the vast majority of Wisconsin’s Black voters reside—Milwaukee and Dane—two counties that are home to three quarters of Wisconsin’s Black voters.<sup>174</sup>

A 2016 analysis of an Ohio removal effort found that the effort disproportionately removed voters in in-town African American neighborhoods relative to predominantly white suburbs—“in predominantly African American neighborhoods around Cincinnati, 10 percent of registered voters had been removed due to inactivity in 2012, compared to just 4 percent in the suburban Indian Hill.”<sup>175</sup> And a purge of registrants in Brooklyn, New York, removed 14 percent of voters in Hispanic-majority districts compared to 9 percent of voters in other districts.<sup>176</sup>

Several approaches states have taken to culling voter rolls have been shown to disproportionately remove properly registered minority voters. To begin, a number of states, including Florida, Georgia, Iowa, Minnesota, Tennessee, and Texas, have sought to remove registrants on the basis that they were non-citizens, often using state and federal databases that can contain inaccurate information.<sup>177</sup> To identify non-citizen registrants, for example, Florida used its Department of Motor Vehicles (“DMV”) and the federal Systematic Alien Verification for Entitlements (“SAVE”) databases and sought to match citizenship information in those databases with its voting rolls.

As explained in the Subcommittee’s prior report, the SAVE database is used at times to verify immigration status when an individual interacts with a state—however, SAVE does not include a comprehensive and definitive listing of U.S. citizens and states have been cautioned against using it to check eligibility.<sup>178</sup> Drivers’ license databases have also proven to be inaccurate for verifying voter registration lists.<sup>179</sup>

According to the U.S. Commission on Civil Rights’ (“USCCR”) 2018 report, the list of 182,000 registrants was created by comparing the voting rolls to drivers’ license databases, “which is an extremely faulty method as drivers’ license databases do not reflect citizenship,” and was then cut back to approximately 2,600.<sup>180</sup> Because, among other reasons, DMV

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> Andy Sullivan & Grant Smith, *Use it or lose it: Occasional Ohio voters may be shut out in November*, REUTERS (June 2, 2016), <https://www.reuters.com/article/us-usa-votingrightsohio-insight/use-it-or-lose-it-occasional-ohio-voters-may-be-shut-out-in-november-idUSKCN0YO19D>; see also Subcomm. on Elections, *Report on Voting Rights and Election Administration in the United States of America*, 116<sup>th</sup> Cong. (2019) at 42–43.

<sup>176</sup> Jonathan Brater *et al.*, *Purges: A Growing Threat to the Right to Vote*, BRENNAN CENTER FOR JUSTICE (2018) at 6, [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Purges\\_Growing\\_Threat.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf).

<sup>177</sup> *Id.* at 9.

<sup>178</sup> Subcomm. on Elections, *Report on Voting Rights and Election Administration in the United States of America*, 116<sup>th</sup> Cong. (2019) at 46; see also *Voting Rights and Election Administration in America: Hearing Before the Subcomm. on Elections*, 116<sup>th</sup> Cong. (2019), written testimony of Michael Waldman at 4; written testimony of Dale Ho at 8–9.

<sup>179</sup> *Id.*, Dale Ho at 12.

<sup>180</sup> U.S. Comm’n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at 147.

records and SAVE databases are not generally updated to remove subsequently naturalized individuals, Florida's reliance on those databases to identify voters subject to being purged erroneously identified numerous registrants as non-citizens, the vast majority of whom were Latino, Hispanic, or Black. For example, of the 1,572 individuals that were notified by Miami-Dade County that they were potentially subject to purge as identified non-citizens, 98 percent of the respondents (549 out of 562) provided evidence that they were citizens and eligible to vote.<sup>181</sup>

Similarly, Texas used DMV records to try to identify non-citizens to remove from its voting rolls.<sup>182</sup> Texas officials initially claimed that the DMV matching effort identified 95,000 non-citizens as registered to vote (58,000 of whom had voted in the previous election).<sup>183</sup> However, because the DMV data did not account for subsequently naturalized citizens, the effort erroneously flagged thousands of individuals who were lawfully registered to vote. In Harris County, Texas, alone, approximately 60 percent of the voters flagged for removal produced evidence confirming their citizenship and entitlement to vote.<sup>184</sup>

An audit of a sample of the remaining registrants identified by the DMV database matching effort as "non-citizens" yielded no non-citizens.<sup>185</sup> Because over 87 percent of Texas' naturalized citizens are Black, Latino, or Asian,<sup>186</sup> these falsely identified non-citizens were overwhelmingly minority voters. Sonja Diaz, Founding Executive Director of the Latino Policy and Politics Initiative at the University of California, Los Angeles ("UCLA LPPI") notes in her testimony that, "[t]he disingenuous targeting of naturalized voters was not unique to Texas, but also found in 16 states where inaccurate immigration data identified and purged rightfully registered Latino voters."<sup>187</sup>

The NAACP Legal Defense Fund's report *Democracy Diminished* noted an additional example of attempts to wrongfully or inaccurately purge voters from the voting rolls, such as in Alabama when, in 2012, parties entered into a partial consent agreement to resolve issues under Section 5 of the VRA and blocked the City of Evergreen from continuing to implement an un-precleared discriminatory voter purge based on utility records that omitted eligible voters from a voter registration list, "including nearly half of the Conecuh County registered voters who reside in districts heavily populated by Black people."<sup>188</sup>

Additionally, several states have relied, or tried to rely, on multi-state databases—Interstate Voter Registration Crosscheck ("Crosscheck") and Electronic Registration Information Center

<sup>181</sup> Compl., *Arcia v. Detzner*, 1:12-cv-22282 ¶ 39 (S.D. Fla. June 19, 2012).

<sup>182</sup> Secretary Whitley Issues Advisory on Voter Registration List Maintenance Activity (Jan. 25, 2019), <https://www.sos.texas.gov/about/newsreleases/2019/012519.shtml>.

<sup>183</sup> *Voting in America: The Potential for Voter List Purges to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Sophia Lin Lakin at 8-10.

<sup>184</sup> *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), written testimony of Dale Ho at 17.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Voting in America: Ensuring Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Sonja Diaz at 24.

<sup>188</sup> *Democracy Diminished: State and Local Threats to Voting Post-Shelby County, Alabama v. Holder*, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. (as of Nov. 13, 2020) at 13.

(“ERIC”)—to identify registrants who allegedly moved to a different state, and therefore were allegedly subject to removal.

Crosscheck, a joint venture of as many as 29 states, was created by former Kansas Secretary of State Kris Kobach to identify voters registered in more than one state.<sup>189</sup> The Crosscheck program sought to do so by comparing voter registration lists from participating states and flagging all records that have the same first and last name, and date of birth.

Quantitative studies have shown that Crosscheck is an unreliable basis for identifying voters registered in multiple jurisdictions because of the small number of data points it uses to identify “duplicate” registrations—many people share the same first and last name and the same birthday.<sup>190</sup> In other words, “a substantial share of the pairings returned to states by Crosscheck [as duplicate registrations] represented cases in which two different registrants shared the same first name, last name, and date of birth instead of the same person being registered in to vote in two different states.”<sup>191</sup>

The states which used Crosscheck to identify duplicate registrants should have known this—Crosscheck’s, “user manual specifically states that ‘a significant number of apparent double votes are false positives and not double votes.’”<sup>192</sup> The accuracy of Crosscheck was also undermined by its use of unreliable registration dates and other data entry errors.<sup>193</sup> Sophia Lin Lakin, Deputy Director of the Voting Rights Project at the American Civil Liberties Union (“ACLU”) notes in her testimony that:

A study by a team of researchers at Stanford, Harvard, the University of Pennsylvania, and Microsoft found that using Crosscheck to purge the voter rolls in one state, “could impede approximately 300 legitimate votes for each double vote prevented.” In other words, the system incorrectly flags people as potential double voters (“matches”) more than 99% of the time because of false positives resulting from poor matching protocols.<sup>194</sup>

Crosscheck’s high error rate and heavy reliance on first and last names to identify duplicate registrants increases the likelihood that properly registered minority voters are subject to removal proceedings at a higher rate than properly registered white voters. As Ms. Lakin explained to the Subcommittee:

<sup>189</sup> *Voting in America: The Potential for Voter List Purges to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Marc Meredith at 3.

<sup>190</sup> Sharad Goel, et al., *One Person, One Vote: Estimating the Prevalence of Double Voting in U.S. Presidential Elections*, 114 AM. POL. SCI. REV. 456 (2020) (finding that “one of Crosscheck’s proposed purging strategies would eliminate about 300 registrations used to cast a seemingly legitimate vote for every one registration used to cast a double vote”); *Voting in America: The Potential for Voter List Purges to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Marc Meredith at 3.

<sup>191</sup> *Voting in America: The Potential for Voter List Purges to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Marc Meredith at 4.

<sup>192</sup> *Voting in America: The Potential for Voter List Purges to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Sophia Lin Lakin at 4.

<sup>193</sup> *Id.* at 5; Jonathan Brater et al., *Purges: A Growing Threat to the Right to Vote*, BRENNAN CENTER FOR JUSTICE (2018) at 8, [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Purges\\_Growing\\_Threat.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf).

<sup>194</sup> *Voting in America: The Potential for Voter List Purges to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Sophia Lin Lakin at 4.

Among some minority populations, first-name naming conventions are more commonly used, and many individuals born around the same historical periods are given the same name. Many often share the same or similar last names. Latinx voters, for example, are more likely than white voters to have one of the most common 100 surnames in the country. Indeed, existing studies show that incorrect matches using such a methodology are disproportionately concentrated among minority voters. Crosscheck flagged one in six Latinx Americans, one in seven Asian Americans, and one in nine African Americans as potential double registrants.<sup>195</sup>

Several states have aggressively sought to purge voters using data they knew or should have known would errantly lead to the removal of properly registered voters. For example, an election official in Kansas—the State that created and managed Crosscheck—contemporaneously admitted that most of the “duplicate” registrations identified by Crosscheck were not the result of fraud, but instead reflected data entry errors, writing in an email disclosed in litigation that, “[i]n the majority of cases of apparent double votes, in the end they do not turn out to be real double votes due to poll worker errors, mis-assignment of voter history, voters signing the wrong lines in poll books, etc.”<sup>196</sup>

Other states participating in Crosscheck were also aware of its high error rate. A 2013 report by the Virginia State Board of Elections, for example, found that, after conducting “quality control for verifying . . . data matches . . . only 57,000 of the 308,579” registrations identified by Crosscheck as “duplicates” in fact warranted initiation of cancellation efforts, meaning that Virginia independently determined that Crosscheck’s error rate likely exceeded 75 percent.<sup>197</sup>

Likewise, Indiana twice used database records to purge “duplicate” registrants from its voting rolls, and in doing so failed to comply with the NVRA. Indiana’s first voter purge effort used data from Crosscheck—which, as explained above, is known to include numerous errors and disproportionately identify minority voters as having moved—to purge voters without providing affected registrants notice of the removal efforts.<sup>198</sup> Empirical evidence presented to the district court revealed that “Indiana’s use of Crosscheck data likely triggered list-maintenance against thousands of eligible registrants who continued to reside at their address of registration, but who had the misfortune of sharing the same first name, last name, and date of birth of a registrant in another Crosscheck member state.”<sup>199</sup>

The U.S. Court of Appeals for the Seventh Circuit held that Indiana’s voter purge program violated the NVRA by removing voters who were suspected of changing residence without

<sup>195</sup> *Id.*, citing Jonathan Brater *et al.*, *Purges: A Growing Threat to the Right to Vote*, BRENNAN CENTER FOR JUSTICE (2018) at 7, [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Purges\\_Growing\\_Threat.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf).

<sup>196</sup> *Voting in America: The Potential for Voter List Purges to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Sophia Lin Lakin at 5.

<sup>197</sup> Virginia State Board of Elections, *Annual Report on Voter List Maintenance Activities* (Jan. 6, 2014), <https://www.elections.virginia.gov/media/formswarehouse/maintenance-reports/2013SBELListMaintenanceReport.pdf>.

<sup>198</sup> *Voting in America: The Potential for Voter List Purges to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Sophia Lin Lakin at 6.

<sup>199</sup> *Voting in America: The Potential for Voter List Purges to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Marc Meredith at 4.

adhering to the NVRA’s notice requirements.<sup>200</sup> Notwithstanding that its previous purge effort had been found to be unlawful, Indiana embarked on a second voter purge effort using a proprietary database that a federal court found was, “functionally identical to Crosscheck.”<sup>201</sup> The district court again concluded that the renewed voter roll purge effort violated the NVRA for the same reason—Indiana was seeking to purge voters using database information without adhering to the NVRA’s notice-and-waiting procedure.<sup>202</sup>

Crosscheck is no longer a widely used system amongst states because of its abuses and inaccuracies. Ms. Lakin testified that the system has been on hold since a 2019 settlement in a case brought by the ACLU of Kansas, “on behalf of 945 voters whose partial Social Security numbers were exposed by Florida officials through a public records request” and it has not been used since, “a Homeland Security audit discovered security vulnerabilities in 2017.”<sup>203</sup> The failures and abuses of Crosscheck demonstrate how list maintenance processes and databases can be abused and lead to erroneous and disproportionate purging of minority voters from the voting rolls.

ERIC is another voter list maintenance tool which is used by 30 states and the District of Columbia to maintain their voter rolls.<sup>204</sup> Whereas Crosscheck used just two datapoints to identify “duplicate” registrations, ERIC uses more information to identify duplicates, including DMV information and Postal Service change of address data.<sup>205</sup> The 31 jurisdictions participating in ERIC have agreed to send postcards to registrants flagged by ERIC as duplicates to confirm their registrations, the first step in removing such registrants from voting rolls.

Though ERIC is generally viewed as more reliable than Crosscheck, it too has room for improvement and can disproportionately impact minority voters. As first noted above, a 2021 study of Wisconsin registrants flagged by ERIC as potentially subject to removal based on a change of address found that approximately four percent of the voters flagged as having moved subsequently voted at their address of registration, meaning that for every 29 registrations ERIC identified as having moved, at least “one registrant continued to reside at their address of registration and used that address to cast a ballot” in the next election.<sup>206</sup>

Notably, the study found that registrants who were Black and Hispanic were significantly more likely to be falsely identified by ERIC as having moved than White registrants, meaning that, “the lower bound on the false mover error rate is more than 100% larger for minorities than for whites.”<sup>207</sup> In other words, the study found that ERIC erroneously identified Black and Hispanic voters as subject to removal at twice the rate at which it erroneously identified White

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<sup>200</sup> *Common Cause Indiana v. Lawson*, 937 F.3d 944, 958-59 (7<sup>th</sup> Cir. 2019).

<sup>201</sup> *Common Cause Indiana v. Lawson*, 481 F. Supp. 3d at 807.

<sup>202</sup> *Ind. State Conf. NAACP v. Lawson*, 481 F. Supp. 3d 826, 840 (S.D. Ind. 2020).

<sup>203</sup> *Voting in America: The Potential for Voter List Purges to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Sophia Lin Lakin at 4.

<sup>204</sup> Gregory Huber *et al.*, *The racial burden of voter list maintenance errors: Evidence from Wisconsin’s supplemental poll movers poll books*, 7 SCI. ADV. 3 (Feb. 17, 2021).

<sup>205</sup> *Id.* at 2-3.

<sup>206</sup> *Id.* at 5.

<sup>207</sup> *Id.*

voters as subject to removal. The authors identified minority registrants' disproportionate likelihood of living in a multi-unit or larger household dwellings (and, therefore, a likely relatively more frequent rate of change of residence within a single jurisdiction) as likely causes for their erroneous identification as subject to purge.<sup>208</sup>

Summarizing the literature on the use of databases to identify duplicate registrants, Dr. Marc Meredith of the University of Pennsylvania—who has published papers analyzing both Crosscheck and ERIC—testified that research “demonstrates that minority registrants are more likely than White registrants to be incorrectly identified as no longer eligible to vote at their address of registration.”<sup>209</sup> Given that the majority of states use databases like Crosscheck and ERIC to identify voters for removal, the discriminatory burdens imposed by use of the databases extend throughout much of the United States.

Ms. Lakin also provided testimony to the Subcommittee on the dangers of “mass voter challenges.” According to her testimony, state “challenger laws”—laws that allow private citizens to challenge the eligibility of prospective voters on or before Election Day—have also been used to remove voters from the rolls *en masse*.<sup>210</sup> These laws have been used to target voters along race, class, and disability lines.<sup>211</sup> As Ms. Lakin explains, “[m]ass challenges are tantamount to a systemic purge, but can be exploited to avoid federal rules governing purge programs, such as the prohibition of systemic removals of voter registrations within 90 days of a federal general election” and can deprive or attempt to deprive thousands of their voting rights.<sup>212</sup>

Furthermore, a 2020 report published by the Native American Rights Fund (“NARF”), *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, highlighted the impact voter purges have on Native American voters. The NARF report details how the non-traditional addresses many Native voters have, or failure to accept a P.O. Box and an applicant’s drawing on the voter registration form, can result in them being purged from the voter rolls.<sup>213</sup> Under the NVRA, election officials cannot deny a voter’s registration or purge an existing application because the applicant uses a non-traditional address or must be identified by landmarks or geographic features.<sup>214</sup>

Additionally, failing to provide language assistance and information about voter purges in the covered Native language, as provided for under Section 203 of the VRA, can negatively impact Native language speaking voters.<sup>215</sup> Wrongful purges can impact Native voters for many subsequent elections. According to NARF’s report:

<sup>208</sup> *Id.* at 4.

<sup>209</sup> *Voting in America: The Potential for Voter List Purges to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Marc Meredith at 1.

<sup>210</sup> *Voting in America: The Potential for Voter List Purges to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Sophia Lin Lakin at 13.

<sup>211</sup> *Id.* at 13-14.

<sup>212</sup> *Id.*

<sup>213</sup> Tucker *et al.*, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, Native American Rights Fund (2020), at 83-84.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

Once purged, many Native voters will not vote again in non-Tribal elections. Effectively, a voter purge can result in permanent disenfranchisement. Far too often, that is precisely what election officials intend to accomplish in Indian Country.<sup>216</sup>

The various processes by which voters are removed from the rolls can be and is abused, resulting in numerous cases in which otherwise eligible voters were erroneously removed from the voting rolls. The data gathered by the Subcommittee illustrates the disproportionate and discriminatory impact borne by minority voters.

This record also demonstrates minority voters face a significant risk of being disproportionately burdened through voter roll purges which are attributable to discriminatory intent. The facts and circumstances surrounding several state and local voter list maintenance efforts and voter purges demonstrate that there is a high risk that the demonstrated, disproportionate burdens on minority voters of such efforts are a product of discriminatory intent.

First, the “historical background” of many of these widespread voter purge efforts raises concerns about intentional discrimination.<sup>217</sup> Several analyses have found that jurisdictions previously covered by Section 5 of the VRA—states that had a history of engaging in intentional discrimination against minority voters—removed voters from their rolls at a faster rate than jurisdictions that had not been previously covered by Section 5. As noted in the discussion above, the Brennan Center found that jurisdictions previously covered by Section 5 would have removed two million fewer voters during the 2012 to 2016 period had they removed registrants at the same rate as jurisdictions not previously subject to preclearance; they removed voters at a significantly higher rate than previously non-covered jurisdictions.<sup>218</sup>

Similarly, a 2020 nationwide study by two researchers at Columbia University’s Barnard College found post-*Shelby County* increases in purge rates of between 1.5 and 4.5 points in jurisdictions formerly covered by Section 5 compared to jurisdictions that had never been covered.<sup>219</sup> In several of these previously covered states, the rate at which voters cast provisional ballots increased after the voter purges, suggesting that voters were improperly purged.<sup>220</sup>

The Subcommittee further found that several state efforts to remove alleged “non-citizens” from their voting rolls involved statements made by elected officials revealing of discriminatory intent. When Texas errantly used DMV records to identify “non-citizen” registrants, the Attorney General of Texas sent the following tweet:

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<sup>216</sup> *Id.*

<sup>217</sup> *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977).

<sup>218</sup> *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), written testimony of Michael Waldman at 3.

<sup>219</sup> Catalina Feder & Michael G. Miller, *Voter Purges After Shelby: Part of Special Symposium on Election Sciences*, 6 AM. POL. RES. 687 (June 1, 2020), <https://journals.sagepub.com/doi/abs/10.1177/1532673X20916426>.

<sup>220</sup> Jonathan Brater et al., *Purges: A Growing Threat to the Right to Vote*, BRENNAN CENTER FOR JUSTICE (2018) at 5, [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_Purges\\_Growing\\_Threat.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf).

**VOTER FRAUD ALERT:** The @Txsecofstate discovered approximately 95,000 individuals identified by DPS as non-U.S. citizens have a matching voting registration record in TX, appr 58,000 of whom have voted in TX elections. Any illegal vote deprives Americans of their voice.<sup>221</sup>

The Texas Governor then issued a statement supporting “prosecution where appropriate” of “this illegal vote [sic] registration.”<sup>222</sup> As noted above, these inflammatory allegations proved to be entirely false. Kristen Clarke, then-Executive Director of the Lawyers’ Committee, testified before the Subcommittee in 2019 that, “the list was based on DMV data that the state knew was flawed and would necessarily sweep in thousands of citizens who completed the naturalization process after lawfully applying for a Texas drivers’ license.”<sup>223</sup> Ms. Diaz testified that litigation work “led Texas officials to admit to knowing the discriminatory impact of their citizenship review on naturalized citizens.”<sup>224</sup> A federal court described the state officials’ communications regarding the non-citizen purge effort as “threatening” and “exemplif[ying] the power of government to strike fear and anxiety and to intimidate the least powerful among us.”<sup>225</sup>

Florida’s misconceived use of the SAVE database to identify “non-citizen” registrants involved similarly troubling evidence of discriminatory intent. The U.S. Department of Homeland Security expressly advised Florida officials that the SAVE database was not a reliable tool to verify citizenship.<sup>226</sup> The State was similarly warned in a letter from the Justice Department.<sup>227</sup> Despite these warnings, Florida nevertheless moved forward with its effort to remove alleged non-citizens using SAVE data—an effort that, as explained above, disproportionately targeted minority voters. The State was ultimately ordered to discontinue its purge based on the use of SAVE data following litigation.<sup>228</sup>

Additionally, many of these voter purges—such as the errant and unlawful purges in Florida, Georgia, and Texas—occurred in states that were previously covered jurisdictions under the VRA and had longstanding histories of racially polarized voting, which courts recognize provides Republican-controlled state legislatures with an incentive to engage in election administration practices that disproportionately burden minority voters likely to support

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<sup>221</sup> *Voting in America: The Potential for Voter List Purges to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Sophia Lin Lakin at 8.

<sup>222</sup> *Id.* at 9.

<sup>223</sup> *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), written testimony of Kristen Clarke at 8.

<sup>224</sup> *Voting in America: Ensuring Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Sonja Diaz at 25.

<sup>225</sup> Order Denying Mot. To Dismiss at 1, 4, *Tex. League of United Latin Am. Citizens v. Whitley*, No. 5:19-cv-00074 (W.D. Tex Feb. 27, 2019), ECF No. 61.

<sup>226</sup> *Voting in America: The Potential for Voter List Purges to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Sophia Lin Lakin at 12.

<sup>227</sup> U.S. Comm’n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at 148; see U.S. Dep’t of Justice, Letter from Thomas E. Perez, Assist. Att’y Gen., U.S. Dep’t of Justice, to Hon. Ken Detzner, Florida Secretary of State (June 11, 2012), <https://assets.documentcloud.org/documents/805150/us-dep-ofjustice-save-letter-1.pdf>.

<sup>228</sup> *Voting in America: The Potential for Voter List Purges to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Sophia Lin Lakin at 12-13.

non-Republican candidates.<sup>229</sup> For example, between 2016 and 2018, Georgia purged more than 10 percent of its voters.<sup>230</sup>

In the context of mass voter challenges, a 2016 case in North Carolina is illustrative of the way in which voter purges based off challenges can be used to discriminate against and suppress minority voters. As detailed in Ms. Lakin’s testimony, in the months and weeks before the November 2016 elections, boards of election in three North Carolina counties canceled thousands of voter registrations, “based solely on challengers’ evidence that mail sent to those addresses had been returned as undeliverable.”<sup>231</sup> Voters were not provided notice, and in one of the counties, “voters who were purged were disproportionately African American.”<sup>232</sup>

In a court hearing on the case, the federal district judge stated that she was “horrified” by the “insane” process by which voters could be removed from the rolls without their knowledge, and went on to say that the mass challenges at issue, “sound[ed] like something that was put together in 1901.”<sup>233</sup> As noted previously, the federal court recognized that these challenges are essentially systematic voter purges and thus require the same protections, and ultimately barred the state from removing voters based on these challenges unless the voters is given notice and a waiting period and unless the removals comply with the NVRA’s mandate of 90 days before federal elections.<sup>234</sup>

As also noted above, the voter purge efforts in Florida and Texas were intended to combat registration and voting by non-citizens, yet each state’s alleged evidence of non-citizen registration and voting proved wholly unsupported when subjected to even minimal scrutiny.<sup>235</sup> The Texas actions, which largely targeted Latino voters, followed an election year wherein Latino voters doubled their turnout.<sup>236</sup>

Since the 2020 election, several states have enacted new laws, along partisan lines, designed to purge voters more aggressively from their rolls. These new laws are justified by no more than unsupported claims of fraud or irregularities in the 2020 election. Iowa enacted a new “use-it-or-lose-it” voting list maintenance law requiring that the Iowa Secretary of State move all registrants who did not vote in the most recent general election to “inactive” status—the first step toward removing the registrant from the state’s rolls.<sup>237</sup> Among those moved to “inactive”

<sup>229</sup> *Perez v. Abbott*, 253 F. Supp. 3d 864, 946 (W.D. Tex. 2017); see also *Georgia State Conf. of NAACP v. Georgia*, 312 F. Supp. 3d 1357, 1360 (N.D. Ga. 2018).

<sup>230</sup> *Voting Rights and Election Administration in Georgia*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), written testimony of Gilda Daniels at 5.

“Between 2016 – 2018, Georgia purged more than 10 percent of its voters, nearly 670,000 registrations were cancelled in 2017 alone.”

<sup>231</sup> *Id.* at 14.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*, citing Mark Joseph Stern, *North Carolina is Engaging in “Insane” Jim Crow-Style Voter Suppression, Says Federal Judge*, SLATE (Nov. 3, 2016), <https://slate.com/news-and-politics/2016/11/federal-judge-slams-north-carolina-voter-purge.html>.

<sup>234</sup> *Id.*, citing N.C. State Conf. of NAACP, 2018 WL 3748172, at 2.

<sup>235</sup> *Voting in America: The Potential for Voter List Purges to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. On Elections, 117<sup>th</sup> Cong. (2021), written testimony of Sophia Lin Lakin at 8-13.

<sup>236</sup> *Voting in America: Ensuring Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Sonja Diaz at 24.

<sup>237</sup> Iowa S.F. 413.

status were hundreds of 17-year-olds who were eligible to register but not yet eligible to vote in the 2020 general election.<sup>238</sup>

Arizona and Florida enacted laws making it easier to remove voters from the states' vote-by-mail registration lists.<sup>239</sup> And Georgia's new voting law, which imposes a variety of restrictions on voting, authorizes any individual Georgia citizen to file an unlimited number of challenges to the eligibility of particular voters.<sup>240</sup>

## CONCLUSION

The evidence before the Subcommittee leads to a clear conclusion—voter list maintenance and voter purge processes can be, and are, wielded in a discriminatory manner and have a disproportionate impact on minority voters. Additionally, as will be discussed later in this report, erroneously removing voters from the rolls does not affect only the individual voter, but can have rippling consequences at the polling place, increasing wait times that also disproportionately impact minority voters.

As Ms. Lakin of the ACLU stated in her testimony, “the integrity of our voter rolls—and thus our democratic process itself—are threatened by overly aggressive practices that wrongfully purge legitimate voters from the rolls—often disproportionately voters of color, voters with disabilities, and other historically disenfranchised voters.”<sup>241</sup> Also, tellingly, because the claimed justifications for the purge efforts have often been found to be unsupported or pretextual, the evidence illustrates that this disproportionate impact can be the product of discriminatory intent. As such, the methods by which states maintain their voter rolls and remove voters from active voter lists deserves a heightened level of scrutiny and protection for voters.

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<sup>238</sup> Ryan J. Foley, *Iowa moves 294,000 registered voters to ‘inactive’ status*, ABC News (Apr. 26, 2021), <https://abcnews.go.com/Politics/wireStory/iowa-moves-294000-registered-voters-inactive-status-77323150>.

<sup>239</sup> Ariz. S.B. 1485; Fl. S.B. 90.

<sup>240</sup> Ga. S.B. 202, *see also Important Facts About LDF’s Lawsuit Challenging Georgia’s Voter Suppression Law*, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., <https://www.naacpldf.org/naacp-publications/ldf-blog/important-facts-about-ldfs-lawsuit-challenging-georgias-voter-suppression-bill/>.

<sup>241</sup> *Voting in America: The Potential for Voter List Purges to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Sophia Lin Lakin at 18.

# CHAPTER FOUR

## *Voter Identification and Documentary Proof-of-Citizenship Requirements*

### BACKGROUND

A variety of state laws require voters to provide identification or attempt to require documentary proof-of-citizenship to vote or register to vote. In recent years, voter identification (“voter ID”) has been pushed forward by many as a simple requirement necessary to combat alleged voter fraud. This, again, is a false narrative.

As Catherine Lhamon, then-Chair of the U.S. Commission on Civil Rights, testified before the Subcommittee in 2019, “[N]ot only was there no evidence given to the Commission about widespread voter fraud, the data and the research that is bipartisan reflect that voter fraud is vanishingly rare in this country... [A]nd so, it is duplicative and also harmful to initiate strict voter ID, among other kinds of requirements, in the name of combating voter fraud.”<sup>242</sup>

Michael Waldman of the Brennan Center testified that, “[v]oter fraud in the United States is vanishingly rare. You are more likely to be struck by lightning than to commit in-person voter impersonation, for example.”<sup>243</sup> Furthermore, AAJC, MALDEF, and NALEO, note in their November 2019 report that, “[n]o proponent of strict ID requirements has ever produced credible evidence of widespread impersonation fraud in the registration or voting process that identification cards would allegedly prevent.”<sup>244</sup>

Despite a continuous lack of credible evidence that in-person voter fraud—the only form of fraud voter IDs would prevent—exists, these laws and polices continue to be pushed for and implemented across the country. Voter ID and documentary proof-of-citizenship laws can and

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*“The primary rationalization for voter ID requirements at the poll is to prevent voter fraud. Yet, there is a proven disconnect between the pretextual justification for voter ID requirements and the dearth of evidence of voter fraud in U.S. elections... What is not rare, however, is how Latinos and other voters of color are disproportionately disenfranchised by restrictive and discriminatory voter identification requirements.”*

— Sonja Diaz, Founding Executive Director,  
UCLA Latino Policy & Politics Initiative

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<sup>242</sup> *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), hearing transcript, Catherine Lhamon answering Congressman Pete Aguilar at 51-52.

<sup>243</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Michael Waldman at 7.

<sup>244</sup> Hustings, Minnis, & Senteno, *Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities' Votes*, NALEO, AAJC, & MALDEF (Nov. 2019) at 34.

do disproportionately impact minority voters and create discriminatory barriers to the ballot box.

Across both this Congress and the last, the Subcommittee heard substantial testimony about the financial burden of voter IDs—effectively creating a new poll tax—and the disproportionate impact this has on minority and low-income voters. Even when states propose to offer “free” IDs, they are not free. This was also borne out in the U.S. Commission on Civil Rights’ 2018 statutory report, *An Assessment of Minority Voting Rights Access in the United States*. For instance, the USCCR report observed that “expenses for documentation (e.g., birth certificate), travel, and wait times are significant—especially for low-income voters (who are often voters of color)—and they typically range anywhere from \$75 to \$175.”<sup>245</sup> According to Professor Richard Sobel’s report on the high cost of ‘free’ photo voter ID cards:

When legal fees are added to these numbers, the costs range as high as \$1,500. Even when adjusted for inflation, these figures represent substantially greater costs than the \$1.50 poll tax outlawed by the 24<sup>th</sup> Amendment in 1964.<sup>246</sup>

In evaluating these costs, Professor Sobel’s report identified seven types of costs for individual voters in obtaining a “free” voter ID: (1) direct costs (out of pocket expenses); (2) time costs for correspondence and waiting to receive documents; (3) postage, delivery, and special handling expenses for documents; (4) travel costs to and from various agencies in order to obtain documents and apply for the ID; (5) travel time costs for making trips to government offices; (6) navigating costs for having to maneuver complex bureaucracies; and (7) waiting time costs at government offices.<sup>247</sup> Professor Sobel notes that there are other possible expenses for some individuals—such as those without driver’s licenses and without access to public transportation, and some may have to pay legal fees and court costs to obtain required documents.<sup>248</sup>

Voter ID laws were some of the first voting laws implemented in previously covered states following the Supreme Court’s decision in *Shelby*. As Mr. Waldman stated in his testimony, “[i]n 2013, at least six states—Alabama, Mississippi, North Carolina, North Dakota, Virginia, and Texas—implemented or began to enforce strict photo ID laws, most of which had previously been blocked by the Department of Justice due to their discriminatory impact.”<sup>249</sup>

Hours after *Shelby County* was decided, Texas revived a previously blocked voter ID law—one of the strictest in the country at the time. Passed and signed into law in 2011, the law did not go into immediate effect as Texas was subject to preclearance. In 2012, the law was denied preclearance on the grounds that it discriminated against Black and Latino voters.<sup>250</sup> Yet,

<sup>245</sup> U.S. Comm’n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at 92, citing Richard Sobel, *The High Cost of ‘Free’ Photo Voter Identification Cards*, HARV. L. SCH. INST. FOR RACE & JUSTICE (June 2014).

<sup>246</sup> Richard Sobel, *The High Cost of ‘Free’ Photo Voter Identification Cards*, Harv. L. Sch. Inst. For Race & Justice (June 2014).

<sup>247</sup> *Id.* at 14-15.

<sup>248</sup> *Id.*

<sup>249</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Michael Waldman at 3.

<sup>250</sup> *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012).

despite the denial of preclearance because of discriminatory effects, within two hours of the *Shelby* decision Texas' Attorney General announced the law would immediately go into effect.<sup>251</sup>

Also, within days of *Shelby*, Alabama announced it would move to enforce a photo ID law it had previously refused to submit to the Department of Justice for preclearance. In 2011, before the *Shelby* decision, the Alabama state legislature passed House Bill (HB) 19, a law requiring voters to present a form of government-issued photo ID to vote.<sup>252</sup> HB 19 also included a provision that would allow a potential voter without the required ID to vote *if* that person could be “positively identified” by two poll workers, a provision Ms. Nelson of the NAACP Legal Defense Fund characterized as one that, “harkened back to pre-1965 vouch-to-vote systems.”<sup>253</sup> Despite the bill being passed and sent to the Governor’s desk in 2011, it was not implemented until after the *Shelby* decision was handed down—after the state was no longer required to submit its voting changes to the DOJ for preclearance review under the VRA.<sup>254</sup>

Less than two months after the Supreme Court struck down the preclearance provisions, North Carolina state legislators wasted no time passing an omnibus “monster law.” The bill included voter ID provisions (among others) and would later be struck down as racially discriminatory. Records in the case showed that the data the State Legislature consulted, “showed that African Americans disproportionately lacked the most common kind of photo ID” and that after *Shelby*, “with race data in hand, the legislature amended the bill to exclude many of the alternative photo IDs used by African Americans. As amended, the bill retained only the kinds of IDs that white North Carolinians were more likely to possess.”<sup>255</sup>

State laws governing the provision of identification at the time of voting can take several forms.<sup>256</sup> Certain states require that a voter present a photo ID to vote (often referred to as “strict photo ID laws”). Other states require that a voter present an ID to vote, but do not require that the ID include a photograph (often referred to as “strict non-photo ID laws”). Others do not require that voters present an ID to vote, but nevertheless permit poll workers to request that voters present either a photo ID (so-called “Non-Strict Photo ID Laws”) or a non-photo ID (so-called “Non-Strict ID Laws”). Presently, 35 states have laws that request or require voters show some form of ID at the polls.<sup>257</sup>

Furthermore, proof-of-citizenship laws require registrants to provide documentary proof that they are United States citizens to register to vote. States that have required documentary proof-of-citizenship as a condition to register to vote have required a variety of forms of citizenship

<sup>251</sup> *Democracy Diminished: State and Local Threats to Voting Post-Shelby County, Alabama v. Holder*, NAACP Legal Defense and Educational Fund, Inc. (as of Nov. 13, 2020) at 54.

<sup>252</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Janai S. Nelson at 13.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204, 216-218 (4<sup>th</sup> Cir. 2016), cert. denied, 137 S. Ct. 1399 (2017).

<sup>256</sup> See Benjamin Highton, *Voter Identification Laws and Turnout in the United States*, 20 ANN. REV. POL. SCI. 149 (2017); U.S. Comm'n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Report* (2018) at 84.

<sup>257</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Nazita Lajevardi at 2.

documents such as birth certificates, passports, certificates of naturalization, or driver’s licenses that specifically identify the individual as a citizen.<sup>258</sup>

Because they involve conditions for applying to register to vote, proof-of-citizenship laws implicate the NVRA. The NVRA provides that driver’s license applications and renewal applications “shall serve as an application for voter registration with respect to elections for Federal office.”<sup>259</sup> Under the NVRA, the federal voter registration form and state voter registration forms included with a driver’s license application and renewal form must require that the applicant attest that they are eligible to vote (including on the basis of citizenship).<sup>260</sup>

States such as Alabama, Arizona, Kansas, and Georgia attempted to enact laws requiring documentary proof of citizenship when registering to vote. Additionally, former Election Assistance Commission (“EAC”) Executive Director Brian Newby attempted to unilaterally allow Alabama, Georgia, and Kansas to require stringent proof-of-citizenship instructions when registering using the federal voter registration form—a move that was blocked by a federal court.<sup>261</sup>

Evidence presented before the Subcommittee and discussed below shows that voter ID and documentary proof-of-citizenship requirements can and do have disproportionate, discriminatory, and suppressive impact on minority voters.

## THE DISPROPORTIONATE AND DISCRIMINATORY BURDEN AND IMPACT ON MINORITY VOTERS OF VOTER ID AND DOCUMENTARY PROOF-OF-CITIZENSHIP LAWS

### Voter ID Laws

Scholars and stakeholders have highlighted a number of ways in which voter ID and documentary proof-of-citizenship laws can and do discriminate against minority voters.<sup>262</sup> As Ms. Diaz of the UCLA Latino Policy and Politics Initiative testified:

Racial/ethnic minorities are among those most sensitive to changes in voting. As such, reforms that enact voter identification laws to participate

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*“Put simply, the contest over voter ID is one of power, access to democracy, and the value of civic voice. As such, who has access to documents which allow you to vote is of primary importance.”*

— Dr. Matt Barreto, UCLA Latino Policy & Politics Initiative

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<sup>258</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Terry Ao Minnis at 10.

<sup>259</sup> 52 U.S.C. § 20508(a).

<sup>260</sup> *Id.*

<sup>261</sup> *League of Women Voters et al. v. Newby*, 838 F.3d 1 (2016); see also Brennan Center for Justice, *League of Women Voters v. Newby* (Sept. 7, 2017), <https://www.brennancenter.org/our-work/court-cases/league-women-voters-v-newby>.

<sup>262</sup> See Benjamin Highton, *Voter Identification Laws and Turnout in the United States*, 20 ANN. REV. POL. SCI. 149 (2017).

in an election have a disparate impact on minority voters voting. … Recent studies show that these effects are even more disastrous for youth of color, who have even less access to valid forms of identification.<sup>263</sup>

Additionally, a February 2020 report published by the UCLA School of Law Williams Institute estimates that voters who are transgender, particularly transgender voters of color, may face additional barriers when required to show ID to vote, especially if they have no ID documents that reflect their correct name and/or gender.<sup>264</sup>

Obtaining the required form of identification or supporting documents is costly, which can disproportionately deter minority voters who are, on average, less wealthy than White voters and who disproportionately lack access to qualifying IDs or documentation. A 2013 study by Harvard Law School’s Charles Hamilton Houston Institute for Race & Justice found that, even in states that provide “free” ID cards, the actual cost of obtaining a qualifying photo ID ranged from \$75 to \$368 due to indirect costs associated with travel time, waiting time, and obtaining necessary supporting documentation.<sup>265</sup>

The documents required to establish proof-of-citizenship are particularly expensive to obtain for naturalized and derivative citizens, sometimes costing in excess of \$1,000.<sup>266</sup> Naturalized voters often must bear these costs in states that require voter ID as well because documents necessary to establish citizenship also are often necessary to obtain a qualifying form of identification.<sup>267</sup> For example, Terry Ao Minnis, Senior Director of Census and Voting Programs for Asian Americans Advancing Justice | AAJC, testified before the Subcommittee that:

If naturalized and derivative citizens need a replacement certificate of citizenship or naturalization to register to vote, they face a major hurdle: certificates of citizenship presently cost upwards of \$1,170 and replacement certificates of naturalization cost upwards of \$555. In addition, to obtain a replacement, the average wait is between 8.5 to 11 months for the Department of Homeland Security to process and to obtain a certificate of citizenship the average wait is 6.5 to 14.5 months.<sup>268</sup>

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<sup>263</sup> *Voting in America: Ensuring Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Sonja Diaz at 18-19.

<sup>264</sup> Kathryn O’Neill and Jody L. Herman, *The Potential Impact of Voter Identification Laws on Transgender Voters in the 2020 General Election*, The Williams Institute, UCLA School of Law (Feb. 2020), [Trans-Voter-ID-Feb-2020.pdf\(ucla.edu\)](https://trans-voter-id-feb-2020.pdf(ucla.edu)); see also Andrew R. Flores, Taylor N. T. Brown, Jody L. Herman, *Race and Ethnicity of Adults Who Identify as Transgender in the United States*, The Williams Institute, UCLA School of Law (Oct. 2016), [Race-Ethnicity-Trans-Adults-US-Oct-2016.pdf\(ucla.edu\)](https://race-ethnicity-trans-adults-us-oct-2016.pdf(ucla.edu)).

“Transgender people of color, young adults, students, people with low incomes, and people with disabilities are likely overrepresented among the other 378,000 voting-eligible transgender people who may face barriers to voting in the 2020 presidential election.”

<sup>265</sup> Richard Sobel, *The High Cost of ‘Free’ Photo Voter Identification Cards*, Charles Hamilton Houston Institute for Race & Justice (June 2013).

<sup>266</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Terry Ao Minnis at 10-12; see also Brennan Center for Justice, *Policy Brief: Proof of Citizenship* (2006), <https://www.brennancenter.org/sites/default/files/analysis/Proof%20of%20Citizenship.pdf>.

<sup>267</sup> *Id.*, written testimony of Terry Ao Minnis at 11-12.

<sup>268</sup> *Id.* at 12.

These burdens will disproportionately burden a growing percentage of the U.S. population. Ms. Minnis testified that Census data show that 62.8 percent of eligible Asian American; 31.0 percent of eligible Latino voters; 23.9 percent Native Hawaiian and Pacific Islander voters; and 10.3 percent of eligible Black voters were naturalized citizens as of 2019, compared to just 3.8 percent of non-Hispanic white voters.<sup>269</sup>

The substantial cost of obtaining qualifying IDs or supporting documentation is particularly high when, as is the case in certain states, DMVs, or other government offices where a voter can obtain a qualifying ID or other form of documentation, are less accessible for minority voters.<sup>270</sup> Voter ID and proof-of-citizenship laws have become, in effect, modern-day poll taxes for many voters.

For example, the implementation of Alabama’s voter ID law soon after the *Shelby* decision, “was accompanied by the closure of nearly half of the state’s DMV locations, with most of the closures in disproportionately poor and Black counties.”<sup>271</sup> The day after the *Shelby* decision, Alabama announced it would implement its 2011 photo ID law—a law it had delayed implementing for two years—for the 2014 election.<sup>272</sup> As a result of the DMV closures, Black voters had to spend more time and money to travel to obtain qualifying IDs. As noted in the Subcommittee’s previous report, the U.S. Department of Transportation (“DOT”) launched an investigation into the DMV closures, which eventually resulted in DOT and the State of Alabama entering into a settlement agreement.<sup>273</sup>

Similarly, DMV offices are not present on reservation lands, meaning that Native American voters often must drive at least an hour to obtain an ID.<sup>274</sup> Indeed, Native American voters in North Dakota had to travel, on average, twice as far as non-Native American voters to visit a driver’s license office,<sup>275</sup> with the average Standing Rock Sioux member having to travel over an hour and a half to reach the nearest site to obtain identification.<sup>276</sup> As Matthew Campbell, Staff Attorney with NARF, testified:

Today, many Native American reservations are located in extremely rural areas, distant from the nearest off-reservation border town. This was by design—official government policies forcibly removed Native Americans and segregated them onto

<sup>269</sup> *Id.*

<sup>270</sup> U.S. Comm’n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States: 2018 Statutory Report* (2018).

<sup>271</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Matt Barreto at 3.

<sup>272</sup> *Democracy Defended: Analysis of Barriers to Voting in the 2018 Midterm Elections*, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. (Sept. 6, 2019), [https://www.naacpldf.org/wp-content/uploads/Democracy\\_Defended\\_9\\_6\\_19\\_final.pdf](https://www.naacpldf.org/wp-content/uploads/Democracy_Defended_9_6_19_final.pdf).

<sup>273</sup> *Citing* U.S. Comm’n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at 173-74.

The Department of Transportation’s investigation found that: “African-Americans in the Black Belt region are disproportionately underserved by ... [the state’s] driver’s licensing services, causing ‘a disparate and adverse impact on the basis of race, in violation of Title VI.’”

<sup>274</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Matthew L. Campbell at 6-7.

<sup>275</sup> *Id.* at 14.

<sup>276</sup> *Id.* at 7.

the most remote and undesirable land. As a result of these policies, travel to county seats for voting services can be an astounding hundreds of miles away. Services such as DMVs and post offices can also require hours of travel.<sup>277</sup>

Various studies have also demonstrated a variety of ways in which voter ID laws disproportionately burden minority voters. To begin, studies have consistently demonstrated that minority voters are disproportionately likely to lack forms of identification required by voter ID laws, meaning that minority voters are more likely to have to take the time and bear the costs of obtaining a qualifying ID.<sup>278</sup>

For example, one analysis found that in four states that had adopted voter ID laws—Wisconsin, Indiana, Pennsylvania, and Texas—White voters were statistically more likely to possess a valid form of ID than Latino and Black voters.<sup>279</sup> Numerous other state-specific and nationwide studies have reached the same conclusion—minority voters disproportionately lack qualifying IDs.<sup>280</sup>

A meta-analysis using both state-level and national survey data revealed “that the magnitude of the negative impact of race on the likelihood of having a valid ID is substantial, outstripping other relevant variables like age, gender, and having been born outside the United States.”<sup>281</sup> This differential effect persisted even when the authors controlled for other explanatory factors like education level, home ownership, and income.<sup>282</sup>

The Subcommittee also received evidence and testimony that the discriminatory burdens associated with obtaining voter ID and documentary proof-of-citizenship laws are particularly pronounced for Native American voters.<sup>283</sup> For example, a North Dakota voter ID law required that qualifying IDs include the voter’s physical address. However, Native American voters who live on reservations often lack a physical address, instead using a post office box.<sup>284</sup> Mr. Campbell testified that “obtaining a state issued ID is unreasonably difficult for many Native voters.”<sup>285</sup>

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277 *Id.* at 3.

278 See generally Charles Stewart III, *Voter ID: Who Has Them? Who Shows Them?*, 66 OKLA. L. REV. 1, 25-27 (2013) (surveying studies).

279 Barreto *et al.*, *The Racial Implications of Voter Identification in America*, 47 AM. POL. RES. 238 (2018); Henninger *et al.*, *Who Votes Without Identification? Using Affidavits from Michigan to Learn About the Potential Impact of Strict Photo Voter Identification Laws* (July 13, 2018) (unpublished) (finding that non-white voters in Michigan were 2.5 to 6 times more likely than white voters to lack a photo ID that complied with state’s non-strict voter ID law).

280 *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Matt Barreto at 3; see also Charles Stewart III, *Voter ID: Who Has Them? Who Shows Them?*, 66 OKLA. L. REV. 1, 41 (2013) finding, using 2012 national survey data, that white voters are significantly more likely to possess a valid license or passport than Black and Hispanic voters.

281 *Id.*, written testimony of Dr. Matt Barreto at 7.

282 *Id.*

283 Tucker *et al.*, *Obstacles at Every Turn: Barriers to Political Participation Faced By Native American Voters*, Native American Rights Fund (2020) at 73-78, [https://vote.narf.org/wp-content/uploads/2020/06/obstacles\\_at\\_every\\_turn.pdf](https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf).

284 *Id.*

285 *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Matthew L. Campbell at 7.

The cost of obtaining a qualifying ID is also disproportionately burdensome for Native Americans, many of whom live below the poverty line and far from offices where they can obtain a qualifying ID.<sup>286</sup> Mr. Campbell, who himself served as one of the litigators on the North Dakota voter ID case, testified that due to these and other issues, “voter identification laws can lead to the disenfranchisement of American Indians and Alaska Natives.”<sup>287</sup> Mr. Campbell further testified that “[f]or impoverished Native Americans, the cost of identification is often prohibitively expensive. Even nominal fees can present a barrier.”<sup>288</sup> Likewise, Alycia LaCounte, General Counsel for the Turtle Mountain Band of Chippewa Indians, testified before the Subcommittee during the 116<sup>th</sup> Congress that the unemployment rate on the Turtle Mountain Reservation hovers near 70 percent: “[u]nderstand that the fee of \$15 is not exorbitantly high, but \$15 is milk and bread for a week for a poor family.”<sup>289</sup> Drivers’ licenses are also often not required for everyday life on the reservation.<sup>290</sup>

*“When faced with the option of paying for gas to travel two hours to a State DMV or buying food or diapers, Native people have little hesitation in choosing survival over a State ID.”*

—Matthew L. Campbell, Staff Attorney,  
Native American Rights Fund

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*“It turned out North Dakota started requiring ID and addresses to vote. I didn’t have an ID with an address on it. We’re homegrown people.*

*We don’t need the residential ID. We know where everybody lives. Sometimes the homes on reservations don’t have addresses. And sometimes people don’t have homes. I’ve been a homeless veteran so sometimes I don’t have an address. I don’t have a car. I can’t afford to get a new ID. I still think I deserve to vote.”*

— Elvis A. Norquay, Member, Turtle Mountain Band of Chippewa Indians (d. 2021)

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Tribal IDs are also not automatically accepted for registration and voting purposes, despite the barriers for tribal members to get a state ID.<sup>291</sup> Often, even when states do accept a tribal ID, the state may require the ID contain certain information to be sufficient that tribal IDs do not contain—updating tribal IDs to contain specialized information or security features can be expensive for impoverished tribes.<sup>292</sup> Additionally, housing insecurity is

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<sup>286</sup> Tucker et al., *Obstacles at Every Turn: Barriers to Political Participation Faced By Native American Voters*, Native American Rights Fund (2020) at 73-78, [https://vote.narf.org/wp-content/uploads/2020/06/obstacles\\_at\\_every\\_turn.pdf](https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf).

<sup>287</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Matthew L. Campbell at 6-10.

<sup>288</sup> *Id.* at 8.

<sup>289</sup> *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116th Cong. (2019), testimony of Alycia LaCounte.

<sup>290</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Matthew L. Campbell at 8.

<sup>291</sup> *Id.* at 9.

<sup>292</sup> *Id.* at 9-10.

pervasive among Native communities, as is a lack of regular postal service, leading many Native individuals to use P.O. Boxes instead of a residential address or omit an address altogether.<sup>293</sup> All of these factors lead to voter ID laws having a disproportionate impact on Native American voters.

The Subcommittee also received substantial testimony in the 116<sup>th</sup> Congress from leaders of the Standing Rock Sioux Tribe, the Turtle Mountain Band of Chippewa Indians, the Spirit Lake Tribe, and the Mandan Hidatsa and Arikara Nation about the significant and disproportionate burden North Dakota's voter ID law had upon their tribal governments and members.<sup>294</sup> Tribal leaders testified as to the substantial resource burden their tribes took on in order to provide their members with new IDs that would qualify for voting under the new law—resources their tribes did not necessarily have.<sup>295</sup> Additional testimony was gathered in the 116<sup>th</sup> Congress at a field hearing conducted in Phoenix, Arizona, and the February 11, 2020, hearing on Native American voting rights further detailing how voter ID issues disproportionately impact Native voters.<sup>296</sup>

Other studies have demonstrated that local officials administer voter ID laws in a discriminatory manner. Dr. Lonna Rae Atkeson of the University of New Mexico testified that several studies of poll workers and voters suggest that implementation practices can result in unequal application of voter identification laws.<sup>297</sup> A study of New Mexico's non-strict voter ID law, for example, found that poll officials were more likely to request that Hispanic voters show an ID than non-Hispanic voters.<sup>298</sup> Dr. Atkeson further testified that the effects of voter ID laws may also be to affect voter confidence and satisfaction in the election process, which may have long-term consequences on voter turnout or lead to increases in provisional voting.<sup>299</sup> Additionally, Dr. Atkeson testified that subsequent studies have sometimes shown various degrees of differences in implementation of voter ID laws between Whites and Hispanics in New Mexico.<sup>300</sup>

Similar studies in Michigan and Boston reached the same result—poll workers are significantly more likely to request that minority voters present ID than White voters. Relatedly, a separate multi-state study found that (1) state and local election officials were

<sup>293</sup> *Id.* at 10.

<sup>294</sup> See Subcomm. on Elections, *Report on Voting Rights and Election Administration in the United States of America*, 116<sup>th</sup> Cong. (2019); see also *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), testimonies of Charles Walker, Alycia LaCounte, Chairwoman Myra Pearson, and Roger White Owl.

<sup>295</sup> See generally, *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), hearing transcript.

<sup>296</sup> *Id.*, see also *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), testimonies of President Jonathan Nez, Governor Stephen Roe Lewis, and Prof. Patty Ferguson-Bohnee; *Native American Voting Rights: Exploring Barriers and Solutions*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2020).

<sup>297</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Lonna Rae Atkeson at 1-2.

<sup>298</sup> Atkeson et al., *A new barrier to participation: Heterogeneous application of voter identification policies*, *Electoral Studies* (2019); see also Stewart, 66 OKLA. L. REV. at 32 (describing study finding that poll workers in Boston were disproportionately likely to ask blacks and Hispanics, relative to whites).

<sup>299</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), testimony of Lonna Rae Atkeson, hearing transcript at 18.

<sup>300</sup> *Id.* at 19.

less likely to answer email questions regarding voter ID requirements when the individual posing the question had a Latino last name and that (2) election officials provided less accurate information regarding voter ID requirements to requesters with Latino last names.<sup>301</sup> This research demonstrates that even non-strict voter ID laws impose discriminatory burdens on minority voters.

Numerous studies also have demonstrated that strict voter ID laws disproportionately decrease registration and turnout of minority voters relative to White voters.<sup>302</sup> One study focusing on Texas' strict voter ID law found that “registrants voting without ID in 2016 were 14 percentage points less likely to vote in the 2014 election, when a strict ID mandate was in place, and significantly more likely to be Black and Latinx than the population voting with ID in 2016.”<sup>303</sup> Additionally, a 2014 report prepared by the Government Accountability Office found that strict voter ID laws in Kansas and Tennessee reduced turnout by larger amounts among African American registrants than among White, Asian American, and Hispanic registrants.<sup>304</sup>

Nationwide and multi-state studies conducted by Dr. Nazita Lajevardi of Michigan State University and her colleagues compared political participation of minority voters in states with strict voter ID laws and states without such laws. In one set of studies, Dr. Lajevardi and her colleagues found that strict voter ID laws “have a differentially negative impact on the turnout of racial and ethnic minorities in primaries and general elections,” estimating that Latinos, for example, are **10 percent** less likely to turnout in general elections in states with strict voter ID laws than in states without such laws.<sup>305</sup>

Dr. Lajevardi and her colleagues further found that, in primary elections, strict voter ID laws “depress Latino turnout by 9.3 percentage points, Black turnout by 8.6 points, and Asian American turnout by 12.5 points.”<sup>306</sup> These turnout declines were associated with increases—in many cases several-fold increases—in the gap in participation rates between white and non-white voters.<sup>307</sup> In

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*“Across the board, my colleagues and I have found that these laws impose a disproportionate burden on minority voters.”*

— Dr. Nazita Lajevardi,  
University of Michigan

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<sup>301</sup> Ariel White, Noah L. Nathan & Julie K. Faller, *What Do I Need to Vote? Bureaucratic Discretion and Discrimination by Local Election Officials*, 109 AM. POL. SCI. ASS'N 1 (2015).

<sup>302</sup> Kuk *et al.*, *A disproportionate burden: strict voter identification laws and minority turnout*, Politics, Groups, and Identities (2020) (relying on multi-state data and finding that turnout declines significantly more in racially diverse counties relative to less diverse counties in states that enact strict voter ID laws); Hajnal *et al.*, *Voter Identification Laws and the Suppression of Minority Votes*, Journal of Politics (2017) (finding that Hispanic turnout declined significantly in states with strict voter ID laws relative to white turnout).

<sup>303</sup> Bernard Fraga & Michael G. Miller, *Who Does Voter ID Keep from Voting* (forthcoming 2021 at J. of Pol.), [https://static1.squarespace.com/static/5fac72852ca67743c720d6a1/t/6095436bfd2d517916dacce9/1620394863800/FragaMiller\\_2021.pdf](https://static1.squarespace.com/static/5fac72852ca67743c720d6a1/t/6095436bfd2d517916dacce9/1620394863800/FragaMiller_2021.pdf).

<sup>304</sup> Government Accountability Office, No. 14-634, *Elections: Issues Related to State Voter Identification Laws* 2 (2014), [GAO-14-634 Highlights, ELECTIONS: Issues Related to State Voter Identification Laws](#).

<sup>305</sup> Zoltan Hajnal *et al.*, *Voter Identification Laws and the Suppression of Minority Votes*, 79 J. POL. 363 (2017).

<sup>306</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Nazita Lajevardi at 3.

<sup>307</sup> *Id.* at 4 (“For Latinos, the predicted gap more than doubled from 4.9 percentage points in states without strict identification laws to 13.5 points in states with strict photo identification laws in general elections, and more than tripled from 3.4 points to 13.2 in

another study published several years later, Dr. Lajevardi and her co-authors found a similar result using a different multi-state dataset and methodology. The study found that “turnout declined significantly more in racially diverse counties relative to less diverse counties in states that enacted strict identification laws... than it did in other states.”<sup>308</sup>

Summarizing these and other studies analyzing the impact of voter ID laws on the political participation of minority voters, Dr. Lajevardi testified that “strict voter identification laws are racially discriminatory and have real consequences for impacting the racial makeup of the voting population.”<sup>309</sup> Dr. Lajevardi also testified that, “[b]y raising the cost of voting for some individuals more than others, they affect who votes and who does not, and in doing so, they substantially shape whose voices are represented in our democracy.”<sup>310</sup>

Dr. Matthew Barreto of the UCLA Latino Policy and Politics Initiative agreed:

The best evidence available suggests that voter ID laws have a negative, racially disparate impact on turnout across the states ...[and] that racial disparities in access to identification appropriate for voting persist even after accounting for important covariates like education and income.<sup>311</sup>

## Documentary Proof-of-Citizenship Requirements

While all states require proof of citizenship to register to vote, an attestation of citizenship under penalty of perjury has generally met the requirement.<sup>312</sup> Similar to voter ID laws, documentary proof-of-citizenship requirements have purported to combat non-citizen voting—a claim that is false.

Documentary proof-of-citizenship laws have also been shown to have similar discriminatory effects on political participation by minority voters as voter ID laws. For example, evidence developed in the course of an investigation by the Kansas State Advisory Committee to the USCCR found that a disproportionate number of Kansas voters who had incomplete voting applications or were placed on the suspense voters list were located in Census tracts with

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primaries. Likewise, for African Americans, the predicted gap in general contests increased from 2.9 points to 5.1 points, and more than quintupled from 2.5 points to 11.6 points in primaries. For Asian Americans, the predicted gap grew from 6.5 percentage points to 11.5 points in general elections and from 5.8 points to 18.8 points in primaries.”).

<sup>308</sup> *Id.* at 5.

<sup>309</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Nazita Lajevardi at 4-6.

<sup>310</sup> *Id.*, see hearing transcript at 26.

<sup>311</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Matt Barreto at 8 (internal citations omitted).

<sup>312</sup> *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), written testimony of Dale Ho at 4, citing As the Tenth Circuit has noted, see *Fish v. Kobach*, 840 F.3d 710 (10<sup>th</sup> Cir. 2016), Congress chose to rely on an attestation to establish eligibility for a wide range of federal programs. See, e.g., 7 U.S.C. § 2020(e)(2)(B)(v) (requiring state applications for Supplemental Nutrition Assistance Program aid be signed under penalty of perjury as to the truth of the information contained in the application and the citizenship or immigration status of household members); 26 U.S.C. § 6065 (requiring that any tax “return, declaration, statement, or other document” be “verified by a written declaration that it is made under the penalties of perjury”); 42 U.S.C. § 1395w-114(a)(3)(E)(iii)(I) (requiring “an attestation under penalty of perjury” as to assets for receipt of prescription drug plan subsidies); 42 U.S.C. § 1436a(d)(1)(a) (requiring an attestation of citizenship or “satisfactory immigration status” for the receipt of housing assistance).

a disproportionately high percentage of Black residents, younger voters, and low-income voters, for whom the high cost of obtaining proof-of-citizenship was disproportionately burdensome.<sup>313</sup> After Arizona’s adoption of a documentary proof-of-citizenship law, for example, “the percent share of Latino voter registration in the state fell.”<sup>314</sup>

Recent studies have demonstrated that African American and Latino voters are less likely to have access to birth certificates and passports—documents often required to establish proof of citizenship—than White voters.<sup>315</sup> And Puerto Rican-born voters face particularly significant difficulty obtaining documents necessary to prove their citizenship as a result of a 2009 change in birth certificate standards that invalidated all birth certificates issued by Puerto Rico prior to 2010—a change that potentially impacts approximately 1.8 million Puerto Rican-born adults now living on the mainland.<sup>316</sup> Since the new standards were adopted, Puerto Rican-born voters who seek to register to vote in a state with a proof-of-citizenship requirement must either have a U.S. passport, or go through additional procedures and pay fees for a new birth certificate after July 2010.<sup>317</sup>

Kira Romero-Craft, Director, Southeast Region for LatinoJustice PRLDEF, testified that in July 2019, for example, LatinoJustice and the Southern Center for Human Rights filed suit in the U.S. District Court for the Northern District of Georgia on behalf of their client for discrimination based on the Georgia Department of Driver Services’ (“DDS”) practice of “confiscating original identity documents from Puerto Rican-born applicants for Georgia drivers’ licenses and denying equal protection of the laws and privileges due to Puerto Rican-born U.S. citizens.”<sup>318</sup> LatinoJustice’s investigations found that the practice of turning away U.S. citizens presenting Puerto Rican identity documents, confiscating Puerto Rico birth certifications and original Social Security cards for “fraud” investigations, or denying them the opportunity to exchange their driver licenses for a Georgia license had been going on as far back as the 1990s and undoubtedly harmed U.S. citizens who were otherwise eligible to vote.<sup>319</sup>

As Ms. Diaz of the UCLA Latino Policy and Politics Initiative testified, proof-of-citizenship laws “give rise to a presumption that the growing and diverse Latino population is under attack; this was especially true of Arizona, where a proof of citizenship law was overturned by

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<sup>313</sup> See *Voting Rights and the Kansas Secure and Fair Elections Act: A Briefing Report of the Kansas Advisory Committee to the U.S. Commission on Civil Rights*, U.S. Comm’n on Civil Rights (Mar. 2017), <https://www.usccr.gov/pubs/docs/KYVotingRightsReport.pdf>

<sup>314</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Andrea Senteno at 3.

<sup>315</sup> *Id.* at 5-6.

<sup>316</sup> *Id.* at 6.

<sup>317</sup> Hustings, Minnis, & Senteno, *Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities’ Votes*, NALEO, AAJC & MALDEF (Nov. 2019) at 40.

<sup>318</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Kira Romero-Craft at 4-5.

<sup>319</sup> *Id.*

the Ninth Circuit.”<sup>320</sup> Andrea Senteno, Regional Counsel for MALDEF, testified that there is a growing body of evidence that:

[S]hows that proof of citizenship requirements in fact prevent significant numbers of U.S. citizens from registering to vote, and that “[s]urveys show that millions of American citizens—between five and seven percent—don’t have the most common types of documents used to prove citizenship: a passport or birth certificate.”<sup>321</sup>

Additionally, Terry Ao Minnis of AAJC testified that documentary proof-of-citizenship, as well as voter ID requirements, disproportionately impact Asian Americans due to high rates of immigration and naturalization in the community.<sup>322</sup> Ms. Minnis testified that Asian Americans will “face greater barriers to registration than white voters under these laws as 76.6 percent of Asian American adults are foreign-born and 39.5 percent of Asian American adults have naturalized nationwide, compared to 4.6 percent of white adults who are foreign-born and 3.8 percent who have naturalized.”<sup>323</sup>

## ADDITIONAL EVIDENCE OF DISCRIMINATORY PURPOSE

The Subcommittee was also confronted with evidence that the discriminatory impact of voter ID and documentary proof-of-citizenship laws are the product of state legislatures enacting them with a discriminatory purpose. As noted above, following the Supreme Court’s decision in *Shelby County*, several states enacted or implemented particularly strict voter ID laws, several of which were later struck down by courts as intentionally discriminatory, and violative of the Constitution and the Voting Rights Act. These restrictions are examples of discrimination in voting that warrant preemptive federal protections.

For example, as first discussed above, within days of the *Shelby County* decision, Texas implemented a photo ID law that had previously been denied preclearance by the Department of Justice. As Janai Nelson of the NAACP Legal Defense Fund testified, the law was widely described as the most restrictive voter ID law in the country as it permitted concealed handgun license owners to vote with that ID—a form disproportionately held by white Texans—but prohibited the use of student IDs, and employee or trial state or federal government-issued IDs in voting.<sup>324</sup>

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<sup>320</sup> *Voting in America: Ensuring Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Sonja Diaz at 7, citing Jessica A. Gonzalez, *CHCI White Paper: New State Voting Laws: A Barrier to the Latino Vote?* (2012) <https://chci.org/wp-content/uploads/2017/11/20124131140426004-LawGraduateSummitWhitePaper-JessicaGonzalez.pdf>; See *Gonzalez v. Arizona*, 435 F. Supp. 2d 997 (2006), *rev’d in part*, 624 F.3d 1162 (9th Cir. 2010), 677 F. 3d 383 (9<sup>th</sup> Cir. 2012) noting “*de jure* discrimination against Latinos in Arizona existed during most of the twentieth century.”

<sup>321</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Andrea Senteno at 4.

<sup>322</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Terry Ao Minnis at 9-10.

<sup>323</sup> *Id.* at 10.

<sup>324</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Janai S. Nelson at 20-21.

The Texas voter ID case took years to make its way through the courts. A federal court found that the voter ID law was unconstitutionally intended to discriminate against minority voters, relying on evidence that the law selectively excluded forms of IDs that were disproportionately likely to be used by minority voters, that the legislature knew the law was likely to disproportionately burden minority voters, and that circumstantial evidence indicated that the legislature's race-neutral justification for the law—preventing voter fraud—was "pretextual."<sup>325</sup> Ms. Nelson testified further that, while LDF was ultimately successful in the Texas voter ID litigation, "in the years after the trial and while the case made its way twice to the 5<sup>th</sup> Circuit Court of Appeals and back to the trial court, Texas elected numerous candidates to state and federal office..."<sup>326</sup>

A federal appellate court also struck down North Carolina's voter ID law as intentionally discriminatory, a law which was also put forth within days of the *Shelby County* decision. Evidence in the North Carolina voter ID case revealed that legislators tailored the list of acceptable IDs to exclude forms of identification disproportionately relied on by minority voters.<sup>327</sup> To support its finding of discriminatory intent—that the state legislature drafted the law to "target African Americans with almost surgical precision"—the court emphasized that North Carolina had a long history of racially polarized voting, that the law required forms of IDs that African Americans disproportionately lacked, that legislators knew the law would disproportionately burden minority voters but nevertheless enacted it, and that the circumstances surrounding the passage of the law—that the law was amended to become far more strict the day after *Shelby County* was decided—indicated that the legislature acted with discriminatory intent.<sup>328</sup>

While the court ultimately struck down the North Carolina law, litigation alone is a costly, time consuming, and insufficient remedy. As Allison Riggs, Co-Executive Director and Chief Counsel for Voting Rights at the Southern Coalition for Social Justice ("SCSJ"), testified:

[I]t took us three years and millions of dollars to finally secure a ruling from the Fourth Circuit Court of Appeals that the law was intentionally racially discriminatory, designed with almost "surgical precision" to change election rules in a way that would disadvantage Black voters the most. More than the time and cost, there were elections conducted with the photo ID requirement...Thousands of voters, disproportionately Black, were denied the franchise while we litigated that

<sup>325</sup> *Veasey v. Abbott*, 830 F.3d 216, 236-38 (5th Cir. 2016) (en banc); see also *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Janai S. Nelson at 21.

<sup>326</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Janai S. Nelson at 21.

Although LDF was ultimately successful in that litigation, in the years after the trial and while the case made its way twice to the 5<sup>th</sup> Circuit Court of Appeals and back to the trial court, Texas elected numerous candidates to state and federal office including: a U.S. senator, members of the Texas delegation to the U.S. House of Representatives, Governor, Lieutenant Governor, Attorney General, Controller, various statewide Commissioners, Justices of the Texas Supreme Court, state boards of education, state senators, members of the state House, state court trial judges, and over district attorneys.

<sup>327</sup> *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 233 (4<sup>th</sup> Cir. 2016).

<sup>328</sup> *Id.*

case, and those are real injuries to those voters' fundamental right to vote that can never be made whole.<sup>329</sup>

As the Texas and North Carolina cases illustrate, the risk that voter ID and documentary proof-of-citizenship laws can and will be enacted with discriminatory intent is particularly significant because legislatures can tailor the forms of acceptable IDs and documentation to disproportionately burden minority voters.

For example, Dr. Barreto, who has conducted extensive research into the discriminatory effects of voter ID laws, explained in his testimony that “[i]n Texas, hunting and gun permits, which Whites are statistically more likely to possess, are legitimate forms of ID but social service cards, more often held by Blacks and Latinos, are not.”<sup>330</sup> Consistent with that empirical evidence, a Texas legislator testified “that all of the legislators knew that [the voter ID law], through its intentional choices of which IDs to allow, was going to affect minorities most.”<sup>331</sup>

Regarding discriminatory intent, Dr. Barreto further explained that research shows that voter ID laws have been adopted by partisan legislatures, often in states with a history of racially polarized voting, to burden voters likely to vote against the party with legislative control.<sup>332</sup> “Existing research demonstrates that voter ID laws are purposeful tools, designed with the marginalized fringe of the electorate in mind, to shape who votes primarily in favor of state Republican legislatures facing competitive elections,” Dr. Barreto explained.<sup>333</sup>

Consistent with Dr. Barreto’s summary of the literature, Matthew Campbell testified that North Dakota’s Republican legislature—which had previously rejected voter ID laws—enacted the state’s strict voter ID law after Native American voters were instrumental to the election of a Democratic candidate to the United States Senate.<sup>334</sup>

Using an atypical procedural process known as a “hoghouse amendment” that “expedited the bill’s passage and stifled debate,” the legislature enacted the law knowing that Native Americans, who often have P.O. Boxes rather than the physical address required by the statute, would have a disproportionately difficult time obtaining a qualifying ID.<sup>335</sup> A federal court subsequently struck down the law on grounds that it imposed an unconstitutional

<sup>329</sup> *Voting in America: Ensuring Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Allison Riggs at 4.

<sup>330</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Matt Barreto at 3.

<sup>331</sup> *Veasey v. Perry*, 71 F. Supp. 3d 627, 657 (S.D. Tex. 2014).

<sup>332</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Matt Barreto at 2-3 (surveying scholarly literature finding that “competitive legislatures where Republicans have a slight edge are most likely to pass ID requirements. Republicans strategically leverage such laws to support turnout among their base while undercutting the turnout of Democratic voters”).

<sup>333</sup> *Id.* at 8.

<sup>334</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Matthew L. Campbell at 12-13.

<sup>335</sup> *Id.* at 13.

burden on Native American voters, relying on evidence that Native American voters were disproportionately likely to lack a qualifying ID and ruling that North Dakota could not enforce the laws without providing a safety net for voters who “cannot obtain a qualifying ID with reasonable effort.”<sup>336</sup>

Despite a lack of fraud and knowledge of the significant impact on Native American voters, North Dakota adopted a strict voter ID law again in 2017. Mr. Campbell testified that, in considering the new voter ID law, “the legislature failed to study, in any way, the impact the law would have on Native Americans. It did not consult any tribal governments about whether its tribal members were negatively impacted by the bill or whether they supported or opposed the bill.”<sup>337</sup>

Following enactment, additional litigation ensued, and the parties eventually settled the matter in a way that ensured Native voters would have equal access to the ballot, but not before the District Court found that the new law required voters have one of the same forms of a qualifying ID that, “was previously found to impose a discriminatory and burdensome impact on Native Americans.”<sup>338</sup>

Similarly, in finding that the Texas voter ID law was intentionally discriminatory, the court emphasized that the voter ID law was passed “in the wake of a seismic demographic shift, as minority populations rapidly increased in Texas, such that ...the party currently in power [wa]s facing a declining voter base and c[ould] gain partisan advantage through a strict voter ID law.”<sup>339</sup>

The Texas and North Carolina examples illustrate another reason why there is a substantial risk that the discriminatory effects of voter ID and proof-of-citizenship laws are attributable to a discriminatory purpose: States’ proffered justification for the laws have been shown to be pretextual or unsupported.

For instance, in the Texas voter ID case, the court found evidence “support[ing] a finding that the Legislature’s race-neutral reason of ballot integrity offered by the State is pretextual.”<sup>340</sup> Among other evidence, the record showed that “the evidence before the Legislature was that in-person voting, the only concern addressed by [the voter ID law], yielded only two convictions for in-person voter impersonation fraud out of 20 million votes cases in the decade leading up to [the law’s] passage.”<sup>341</sup>

A case successfully challenging a Kansas documentary proof-of-citizenship statute similarly turned on evidence that the alleged justification for the law—preventing voter fraud—lacked meaningful factual support.<sup>342</sup> In finding that the law violated the Equal Protection Clause,

<sup>336</sup> *Id.* at 14-15 (citing *Brakebill v. Jaeger*, No. 1:16-CV-008, 2016 WL 7118548 (D.N.D. Aug. 1, 2016).

<sup>337</sup> *Id.* at 17.

<sup>338</sup> *Id.* at 18-19.

<sup>339</sup> *Veasey v. Abbott*, 830 F.3d at 241 (internal quotation marks omitted).

<sup>340</sup> *Veasey v. Abbott*, 830 F.3d at 237.

<sup>341</sup> *Id.* at 239.

<sup>342</sup> *Fish v. Schwab*, 957 F.3d 1105 (10<sup>th</sup> Cir. 2020).

the U.S. Court of Appeals for the Tenth Circuit held that law’s significant burden on the right to vote (it prevented more than 31,000 qualified applicants from obtaining registration) far outweighed the evidence supporting the state’s claimed need to prevent voter fraud by non-citizens (the state identified only 30 non-citizens who registered to vote in the 10 years leading up to adoption of the documentary proof-of-citizenship law).<sup>343</sup>

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*“Arizona’s Proposition 200 was enacted with the purpose of combatting undocumented immigration, and the provisions related to proof of citizenship were in part an effort to ‘combat voter fraud.’ But the State failed to identify a single instance in which an undocumented immigrant registered or voted in Arizona.”*

—Andrea Senteno, Regional Counsel,  
MALDEF

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The record in a case successfully challenging an Arizona proof-of-citizenship law similarly included a conspicuous absence of evidence supporting the legislature’s claimed purpose of combatting voter fraud by non-citizens.<sup>344</sup> Ms. Senteno of MALDEF testified that, Arizona’s Proposition 200 was enacted with the purpose of combatting undocumented immigration and the provisions related to proof of citizenship were in part an effort to “combat voter fraud”—but the State “failed to identify a single instance in which an undocumented immigrant registered or voted in Arizona.”<sup>345</sup> Ms. Senteno testified that:

Proof-of-citizenship requirements have yet to prove effective in making our elections more secure or to be more effective than the safeguards against improper registration and voting that already exist. Meanwhile, such requirements have shown to significantly impede the political participation of voters of color.<sup>346</sup>

Additionally, since the 2020 election, several states have adopted bills expanding voter ID requirements, appealing to unsupported claims that fraud occurred in the 2020 election as justification. For example, the omnibus Georgia voting bill requires voters requesting an absentee ballot provide an ID.<sup>347</sup> Under previous law, voters only had to sign the application attesting to their eligibility to vote. Similarly, Florida’s omnibus voting law added a new requirement that voters provide a form of ID to obtain a mail-in ballot.<sup>348</sup> Arkansas, Montana, and Wyoming also made their voter ID laws more restrictive.<sup>349</sup>

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<sup>343</sup> *Id.*

<sup>344</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Andrea Senteno at 3.

<sup>345</sup> *Id.*

<sup>346</sup> *Id.* at 4.

<sup>347</sup> Ga. S.B. 202.

<sup>348</sup> Fl. S.B. 90.

<sup>349</sup> Ark. H.B. 1112 & 1244; Mont. S.B. 169; Wy. H.B. 75.

## CONCLUSION

The evidence before the Subcommittee is overwhelming—voter ID laws and requirements for documentary proof-of-citizenship can and do have a disproportionate, discriminatory impact on minority voters. The evidence presented shows that minority voters are less likely than White voters to have the required ID and are more likely to lack the documents required to obtain these IDs. Voter ID and documentary proof-of-citizenship requirements amount to modern-day poll taxes—as the evidence shows, even when states claim to provide free IDs, the cost to voters is not free.

The burden of voter ID and proof-of-citizenship laws is borne disproportionately by Black, Latino, Asian American, and Native American voters, and as the evidence shows, states can and have enacted laws governing ID requirements to cast a ballot that not only have a discriminatory impact but do so with discriminatory intent. The discriminatory and suppressive effects of voter ID and proof-of-citizenship requirements warrant a heightened level of scrutiny and protection to ensure every voter has equal and equitable access to their right to vote.

# CHAPTER FIVE

## *Access to Multi-Lingual Voting Materials and Assistance*

### BACKGROUND

As it was amended over the years, the VRA was expanded to afford additional protections to language minority or limited-English proficiency (“LEP”) voters. The language access provisions were added after Congress recognized that certain minority citizens experienced historical discrimination and disenfranchisement due to limited English proficiency and speaking ability.<sup>350</sup> The 1975 amendments adding Section 203 of the VRA came after “Congressional findings of discrimination and intimidation of voters with limited-English proficiency, which had led to ongoing socioeconomic disparities and low literacy rates.”<sup>351</sup>

Sections 4(e), 4(f), 203, and 208 are considered the “language minority provisions” of the VRA.<sup>352</sup> These sections were not overturned by the *Shelby* decision, and remain key protections for LEP voters. However, significant gaps in enforcement and implementation remain, and the Court’s decision in *Shelby* and subsequent removal of preclearance hindered a key enforcement and monitoring mechanism, limiting access for millions of LEP voters—a disproportionate number of whom are minority voters.

Section 4(e) protects U.S. citizens educated “in American flag schools” in a language other than English by barring states and local governments from conditioning such citizens’ right to vote on their ability to read, write, understand, or interpret English.<sup>353</sup> In practice, this means that every state and local government is required to provide language assistance to such voters and it provides specific protections to citizens educated in Puerto Rico in Spanish.<sup>354</sup>

These protections extend to all 50 states, whether the voter lives in a jurisdiction covered by the population thresholds of Section 203’s coverage formula or not.<sup>355</sup>

Section 203 of the VRA, originally adopted as part of the second reauthorization in 1975 and later amended and expanded, requires jurisdictions where the number of U.S. citizens of voting age in a single, covered<sup>356</sup> language minority group that is more than 10,000 or exceeds

<sup>350</sup> *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), written testimony of John C. Yang at 8.

<sup>351</sup> U.S. Comm’n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at 33-34.

<sup>352</sup> *Id.* at 28-29.

<sup>353</sup> 52 U.S.C. § 10303(e).

<sup>354</sup> 52 U.S.C. § 10303(e)(1), *see also* U.S. Comm’n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at 29.

<sup>355</sup> *Id.*

<sup>356</sup> The statutorily covered language minority groups are American Indians, Asian Americans, Alaskan Natives, or persons of Spanish heritage. 52 U.S.C. § 10310(c)(3).

five percent of the jurisdiction’s total population, and their illiteracy rate is higher than the national rate, to provide voting materials in the language of the language minority.<sup>357</sup> The definition of permanently prohibited “test[s] and device[s]” was expanded to include:

[A]ny practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority.<sup>358</sup>

The 1992 VRA amendments expanded the coverage formula for language access to include not only the previously covered formula of five percent of eligible voters who were LEP voters and members of a language minority group, but also those jurisdictions that did not have the high five percent threshold, but had at least 10,000 LEP citizens who are members of a single language minority group.<sup>359</sup> This expansion meant coverage would also reach Latino and Asian American voters in some large cities.<sup>360</sup> These amendments also expanded the coverage formulas and access for Native Americans living on Indian Reservations to include any Indian reservation where the LEP population exceeded five percent of all reservation residents.<sup>361</sup> Under the VRA 2006 reauthorization, the sunset date for language minority assistance required under Section 203 was extended to August 5, 2032.<sup>362</sup>

Which jurisdictions are covered under Section 203 is determined by the Census Bureau based on the formula set out in the VRA—the language minority groups covered are those that speak Asian, American Indian, Alaska Native, and Spanish languages.<sup>363</sup> The most recent determinations for Section 203 coverage were made on December 5, 2016.<sup>364</sup> In the 2016 evaluation, the Census Bureau found that 263 jurisdictions met the threshold for coverage.<sup>365</sup>

<sup>357</sup> U.S. Comm’n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at 28-29; *see also* 52 U.S.C. § 10303(f)(4) (describing bilingual election requirements); *see also* 52 U.S.C. § 10503(b)(2)(A) (describing the coverage formula); *see also* *About Language Minority Voting Rights*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/crt/about-language-minority-voting-rights>.

<sup>358</sup> 52 U.S.C. § 10303(f)(3); *see also* U.S. Comm’n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at 33-34.

<sup>359</sup> U.S. Comm’n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at 36.

<sup>360</sup> *Id.* at 36-37.

<sup>361</sup> *Id.* at 36-37, *citing* James Thomas Tucker, *Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act*, N.Y.U. J. LEG. & PUB. POL’Y 215 (2016), <http://www.nyulegis.org/wp-content/uploads/2012/11/TUCKERENFRANCHISING-LANGUAGE-MINORITY-CITIZENS-TEH-BILINGUAL-ELECTION-PROVISIONS-OF-THE-VOTINGRIGHTS-ACT.pdf>.

<sup>362</sup> Federal Registrar, *Voting Rights Act Amendments of 2006, Determinations Under Section 203* (pub. Dec. 5, 2016), <https://www.federalregister.gov/documents/2016/12/05/2016-28969/voting-rights-act-amendments-of-2006-determinations-under-section-203>.

<sup>363</sup> *Section 203 Language Determinations*, U.S. Census Bureau (May 5, 2017), <https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/voting-rights-determination-file.html>.

<sup>364</sup> Civil Rights Division, *About Language Minority Voting Rights*, U.S. DEP’T OF JUSTICE (updated Mar. 11, 2020), <https://www.justice.gov/crt/about-language-minority-voting-rights>.

<sup>365</sup> U.S. Comm’n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at 187 (internal citations omitted).

The Census found ‘68,800,641 eligible voting-age citizens in the covered jurisdictions, or 31.3% of the total U.S. citizen voting-age population.’ Moreover, 16,621,136 Latino, 4,760,782 Asian, and 357,409 American Indian and Alaska Native voting-age citizens live in the covered jurisdictions.

Between 2011 and 2016, 15 additional counties were added to the list of localities required to provide language assistance materials as well as four new states.<sup>366,367</sup> Political subdivisions within Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, and Wisconsin currently fall under Section 203 coverage and are required to provide bilingual voting materials.<sup>368</sup> California, Florida, and Texas currently fall under statewide coverage for Spanish language materials.<sup>369</sup>

Added in the 1982 VRA reauthorization, Section 208 requires that voters who require assistance to vote be provided the assistance of their choice.<sup>370</sup> Voters have the right to assistance by a person of their choosing—other than their employer, an agent of their employer, or an officer or agent of the voter’s union—whether they need assistance because of blindness, disability, or inability to read or write.<sup>371</sup> According to the USCCR’s 2018 *Minority Voting Rights Access Report*, Section 208 litigation by the Justice Department typically relates to the failure to provide language assistance or a failure to allow a disabled person to choose their assistance.<sup>372</sup>

Prior to the *Shelby County* decision, covered jurisdictions were required to obtain preclearance of any changes in laws related to the provision of language access under Sections 4(f)(4) and Section 5.<sup>373</sup> Following the *Shelby* decision, the Justice Department stated that it believed it could no longer require preclearance of changes in access to language materials and support in the previously covered jurisdictions.<sup>374</sup>

When properly implemented, the language access provisions increase engagement in the democratic process and access to the ballot for millions of LEP voters. For example, John Yang, President and Executive Director of AAJC, testified before the Subcommittee in 2019 that “Section 203 has been one of the most critical provisions in ensuring Asian Americans are able to cast their ballot.”<sup>375</sup> Jerry Vattamala, Director of the Democracy Program at the Asian American Legal Defense and Education Fund (“AALDEF”) testified that:

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<sup>366</sup> Section 203 applies in jurisdictions in which (1) more than 5 percent of citizens of voting age are members of a single language minority group and are LEP; or in which over 10,000 citizens of voting age meet the same criteria; or in Indian Reservations in which a whole or part of the population meets the 5 percent threshold; and (2) the literacy rate of the citizens in the language minority as a group is higher than the national illiteracy rate. See 52 U.S.C. § 10503(b)(2)(A)(i) and (ii).

<sup>367</sup> *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), written testimony of Arturo Vargas at 5.

<sup>368</sup> Federal Registrar, *Voting Rights Act Amendments of 2006, Determinations Under Section 203* (pub. Dec. 5, 2016), <https://www.federalregister.gov/documents/2016/12/05/2016-28969/voting-rights-act-amendments-of-2006-determinations-under-section-203>.

<sup>369</sup> *Id.*

<sup>370</sup> U.S. Comm’n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at 29; see 52 U.S.C. § 10508.

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*, see U.S. Dep’t of Justice, *Voting Section Litigation*, <https://www.justice.gov/crt/voting-section-litigation>; see, e.g., *United States v. Fort Bend Cty.*, No. 4:09-CV-1058 (S.D. Tex. 2009); *United States v. City of Phila.*, No. 06-CV-4592 (E.D. Pa. 2007); *United States v. Brazos Cty.*, C.A. No. H06-2165 (S.D. Tex. 2006); *Osceola Cty.*, No. 6:02-CV-738-ORL-22JGG.

<sup>373</sup> 52 U.S.C. § 10303(f)(4).

<sup>374</sup> U.S. Comm’n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at 191.

<sup>375</sup> *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), written testimony of John C. Yang at 8.

Section 203 has proven to be a clear and effective measure to ensure access to LEP voters through language assistance. ...However, the Supreme Court's *Shelby County* decision dismantling the coverage formula has left a large gap in protections for Asian American voters that requires Congressional action and renewed DOJ enforcement of remaining VRA provisions.<sup>376</sup>

Failure to provide multi-lingual voting materials or assistance can negatively impact millions of potential voters. According to the 2018 Census data, more than 37 million American adults speak a language other than English and more than 11.4 million of them are not yet fully fluent in English.<sup>377</sup> The 2015-2019 American Community Survey (ACS) 5-year Narrative Profile from the Census Bureau found that, among people at least five years old living in the U.S. from 2015-2019, 21.6 percent spoke a language other than English at home.<sup>378</sup> Additionally, navigating the electoral process is complex and can be overwhelming. Some LEP voters will have immigrated from a country with a vastly different electoral and voting process.

Evidence collected by the Subcommittee during the 116<sup>th</sup> and 117<sup>th</sup> Congresses, along with historical data, illustrates a long history of jurisdictions' failure to comply with the language access provisions, a failure to provide adequate language assistance and translated materials, and the discriminatory impact this failure has on minority voters' access to the ballot.

Arturo Vargas, Chief Executive Officer of the National Association of Latino Elected and Appointed Officials Educational Fund ("NALEO") testified in 2019 that, "Americans who depend upon language assistance are becoming more diverse and more geographically dispersed, and these factors heighten the importance of effective language assistance."<sup>379</sup>

## THE DISPROPORTIONATE AND DISCRIMINATORY BURDEN AND IMPACT OF LACK OF ACCESS TO MULTI-LINGUAL VOTING MATERIALS AND SUPPORT

The failure to provide multi-lingual voting materials disproportionately burdens minority voters. Sonja Diaz of UCLA's Latino Policy and Politics Initiative testified that, as of 2019, approximately 4.82 percent of the citizen voting-age population needs to cast a ballot in a language other than English.<sup>380</sup> Data trends show that populations such as Asian American and Latino voters will only continue to grow. While the full 2020 Census data has yet to be released, Ms. Minnis testified that, among Asian Americans "[t]his growth will continue, with

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<sup>376</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong.* (2021), written testimony of Jerry Vattamala at 6, 9.

<sup>377</sup> Hustings, Minnis & Senteno, *Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities' Votes*, NALEO, AAJC & MALDEF (Nov. 2019) at 48.

<sup>378</sup> American Community Survey, *2015-2019 ACS 5-Year Narrative Profile: The United States*, U.S. Census Bureau, <https://www.census.gov/acs/www/data-tables-and-tools/narrative-profiles/2019/report.php?geotype=nation&usVal=us>.

<sup>379</sup> *Voting Rights and Election Administration in America: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong.* (2019), written testimony of Arturo Vargas at 4-5.

<sup>380</sup> *Voting in America: Ensuring Free and Fair Access to the Ballot: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong.* (2021), written testimony of Sonja Diaz at 20.

Asian American and Pacific Islander (AAPI) voters making up five percent of the national electorate by 2025 and 10 percent of the national electorate by 2044.”<sup>381</sup>

According to 2017 data, more than 85 percent of the voters who likely require language assistance in voting were voters of color.<sup>382</sup> For example, Ms. Diaz stated that an estimated six million eligible Latino voters nationwide are not fully fluent in English and require some form of language assistance in order to vote.<sup>383</sup> Additionally, Juan Cartagena, President and General Counsel of LatinoJustice PRLDEF, testified before the Subcommittee in 2019 that the population on the island of Puerto Rico is roughly 65 percent Spanish-language dominant.<sup>384</sup> Furthermore, in Puerto Rico all government proceedings happen in Spanish, making the language access protections afforded Puerto Ricans educated on the island under Section 4(e) critical to their ability to participate fully in elections within the 50 states.<sup>385</sup>

According to data collected by the Native American Rights Fund, “[o]ver a quarter of all single-race American Indian and Alaska Natives speak a language other than English at home,”<sup>386</sup> rendering multi-lingual voting materials particularly important for Native American voters.

Ms. Minnis of AAJC testified that, because of historical discrimination that denied Asian Americans the rights held by U.S. citizens for most of the country’s existence, and because immigration from Asia was not reopened until 1965, today “almost three out of every four Asian Americans speaks a language other than English at home and almost one in three Asian Americans is limited English proficient (LEP) – that is, has some difficulty with the English language.”<sup>387</sup>

The provision of language access materials, or lack thereof, extends to all facets of the voting process. Ms. Minnis testified that, even basic information such as election notices and voter registration forms or the information requested on those forms “is inaccessible to millions of eligible American voters unless they have access to multilingual translators, preventing the eligible voter from even starting the process.”<sup>388</sup> Ms. Minnis further testified that, even if the voter is able to get past the registration phase, without language assistance they may have issues navigating the voting process, with many voters forced to use election websites that are

<sup>381</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Terry Ao Minnis at 3.

<sup>382</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Andrea Senteno at 7.

<sup>383</sup> *Voting in America: Ensuring Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Sonja Diaz at 20.

<sup>384</sup> *Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), testimony of Juan Cartagena, hearing transcript at 85.

<sup>385</sup> *Id.*

<sup>386</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Matthew L. Campbell at 5.

<sup>387</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Terry Ao Minnis at 5.

<sup>388</sup> *Id.*

English-only, or a jurisdiction may attempt to use Google Translate or a similar tool, which may produce incomplete or inaccurate translations, the equivalent of providing no translation at all.<sup>389</sup>

Matthew Campbell of NARF testified to the disproportionate impact the lack of language access and assistance has on Native voters as well. According to his testimony, “[t]wo-thirds of all speakers of American Indian or Alaska Native languages reside on a reservation or in a Native village, including many who are linguistically isolated, have limited English skills, or a high rate of illiteracy,” and that a lack of assistance or complete and accurate translations of materials for LEP American Indian and Alaska Native voters “can be a substantial barrier.”<sup>390</sup> Thirty-five political subdivisions in nine states are required to provide bilingual written materials and oral language assistance for LEP American Indian and Alaska Native voters under Section 203.<sup>391</sup> Mr. Campbell noted that, jurisdictions have often failed to provide any language assistance at all, forcing Native voters to file costly lawsuits.<sup>392</sup>

Scholars and stakeholders have demonstrated that providing LEP voters with voting materials in their native language increases the likelihood they will participate in the political process.<sup>393</sup> Studies have shown, for example, that language fluency correlates with political participation, meaning that lowering language barriers should lead to increases in turnout among LEP voters.<sup>394</sup> Summarizing the scholarly literature examining the impact of access to multi-lingual voting materials on LEP voters, Dr. Barreto explained that “[r]esearch in political science has documented with clear evidence that access to Spanish, Asian, and Native/indigenous language voting materials increases voter participation rates among impacted minority voters.”<sup>395</sup>

Scholars and stakeholders have also analyzed the registration and turnout effects associated with living in a jurisdiction that provides language access materials, finding that access to native language voting materials increases political participation. For example, after San Diego County, California, began providing language assistance to Latinos and Filipinos, voter registration among those two groups increased by more than 20 percent.<sup>396</sup> Regarding turnout,

<sup>389</sup> *Id.* at 6-7.

<sup>390</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Matthew L. Campbell at 19.

<sup>391</sup> *Id.* at 5.

<sup>392</sup> *Id.* at 19.

<sup>393</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Matt Barreto at 9; see also Michael Parkin & Frances Zlotnick, *English Proficiency and Latino Participation in U.S. Elections*, 39 POL. & POL’Y 515 (2011) (finding that inability to speak or read English hinders registration and turnout among Latino citizens).

<sup>394</sup> Daniel J. Hopkins, *Translating into Votes: The Electoral Impacts of Spanish-Language Ballots*, 55 AM. J. POL. SCI. 814, 816 (2011) (surveying scholarly literature and finding that “language fluency correlates with political participation, so lowering language barriers should expand the electorate” (citing, e.g., Matt A. Barreto & Jose Munoz, *Re-examining the Politics of In-between: Political Participation of Mexican Immigrants in the United States*, 25 HISP. J. BEHAVIORAL SCI. 427 (2003))).

<sup>395</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Matt Barreto at 9.

<sup>396</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Terry Ao Minnis at 6.

one multi-jurisdiction study found that turnout of voters who speak only Spanish increased between seven and 11 percentage points in counties that were required to provide language access support relative to counties with similarly large Latino populations not required to provide bilingual voting support.<sup>397</sup>

Another multi-state study found that, in the 2012 election, coverage under the VRA's language access provisions was associated with a significant increase in Latino voter registration and a significant increase in Asian American turnout.<sup>398</sup> Earlier studies reached the same conclusion: "Section 203 language access resulted in higher voting rates for Latinos, Asian Americans and other immigrant communities."<sup>399</sup> Surveying several of these studies, Ms. Minnis of AAJC explained that "[i]f the access to multilingual support helps to eradicate language barriers, the withdrawal or denial of multilingual support exacerbates language barriers, interferes with free and fair access to the ballot through the voting process, and leads to less voters participating in American democracy."<sup>400</sup>

Empirical research also found evidence that coverage under the VRA increases minority political participation. One study found that coverage under the Voting Rights Act language access provisions is associated with significantly higher Latino representation on school boards relative to non-covered jurisdictions.<sup>401</sup> That empirical finding is consistent with evidence presented to the Subcommittee. For example, Orange County, California, and Harris County, Texas, saw the election of Vietnamese American elected officials after they began providing language assistance to Vietnamese American voters.<sup>402</sup>

Dr. Barreto testified that, "similar to voter identification laws, the research has demonstrated an inconsistent application with many covered jurisdictions not aware or not providing the proper non-English voting materials. This has a tremendously negative impact on those communities' ability to understand and participate in our elections."<sup>403</sup>

Illustrative of the broad protections courts have read into language protections such as Section 4(e), Kira Romero-Craft, Southeast Region Director for LatinoJustice, testified that courts have declined to read any numerical requirements into Section 4(e)'s plain language and have ordered counties with as few as two dozen Puerto Rican voters to offer some bilingual

<sup>397</sup> Daniel J. Hopkins, *Translating into Votes: The Electoral Impacts of Spanish-Language Ballots*, 55 AM. J. POL. SCI. 814, 821 (2011).

<sup>398</sup> Bernard Fraga and Julie Lee Merseth, *Examining the Causal Impact of the Voting Rights Act Language Minority Provisions*, 1 J. RACE, ETHNICITY, AND POL. 31 (2016).

<sup>399</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Matt Barreto at 9.

<sup>400</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Terry Ao Minnis at 6.

<sup>401</sup> Melissa Marschall and Amanda Rutherford, *Voting Rights for Whom? Examining the Effect of the Voting Rights Act on Latino Political Incorporation*, 60 AM. J. POL. SCI. 590 (2015).

<sup>402</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Terry Ao Minnis at 6.

<sup>403</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), testimony of Dr. Matt Barreto, hearing transcript at 62.

assistance because, “it is a ‘basic truth that even one disenfranchised voter—let alone several thousand—is too many.’”<sup>404</sup>

Limits on language assistance also disproportionately impacts minority voters. Ms. Senteno testified that, for example, MALDEF is involved in a pending case in Arkansas challenging a section of the state’s election code that limits the number of voters an individual may assist with casting a ballot to six total, arguably restricting the number of voters who may be able to receive language assistance from the person of their choice.<sup>405</sup>

The manner in which voting materials and ballots are written can also negatively impact LEP voters. Ms. Minnis testified that, even if an LEP voter is able to obtain a ballot, it is often written in advanced English, which is not accessible for LEP voters.<sup>406</sup> In her testimony, Ms. Minnis notes that an analysis of statewide ballot measures voters voted on in 2018 found that the average grade level was between 19 and 20, meaning it would require a graduate-level degree to understand them.<sup>407</sup> The use of complex English on ballots and other voter materials makes it difficult for LEP voters to understand and respond, which can also be compounded by higher levels of illiteracy rates, whether in English or the voter’s native language.<sup>408</sup>

Dr. Barreto testified that, where Section 203 and 208 have been implemented fairly and fully,

[W]e have seen a higher voter participation rate, both first-time voters as well as [...] of returning voters, where the most difficult things can be for a voter which has language challenges to navigate the system, and if they don’t feel that they can do that, if they don’t feel welcome, if the language materials are not available [...] they may just leave and not come back. They may feel excluded from the system. Where Section 203 is implemented, there have been very robust increases in Spanish-speaking Latino voter participation.<sup>409</sup>

Dr. Barreto noted that, where voters have a negative experience at the polls and are challenged or are not able to navigate the polling place, “that leads to a rejection and withdrawal.”<sup>410</sup>

Several legal actions have successfully sought to compel local election officials to provide language access materials, often requiring years of litigation for plaintiffs to obtain relief and involving troubling evidence of discriminatory animus.

<sup>404</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Kira Romero-Craft at 2-3.

<sup>405</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Andrea Senteno at 7.

<sup>406</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Terry Ao Minnis at 8.

<sup>407</sup> *Id.*

<sup>408</sup> *Id.*

<sup>409</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), testimony of Dr. Matt Barreto, hearing transcript at 76.

<sup>410</sup> *Id.* at 77.

A district court found that Berks County, Pennsylvania, for example, failed to adhere to language access provisions in the VRA by failing to offer Spanish-language materials for voters educated in Puerto Rico and failing to make available bilingual poll workers.<sup>411</sup> The court further found that local election officials engaged in “hostile and unequal treatment” of Hispanic and LEP voters, which “intimidated” such voters.<sup>412</sup>

Additionally, Ms. Romero-Craft testified that the State of Florida has been a covered jurisdiction for the Spanish language under Section 203 since 2011 and that there are also 13 counties in the state which are subject to minority language requirements for Spanish under the law. Yet, despite the direct protections of the law:

Florida’s language minority voters have continued to face discrimination at the polls and frequently do not receive adequate language assistance they critically need to be able to cast a ballot for their preferred candidate of choice or to make informed decisions when deciding how to cast their votes on ballot initiatives.<sup>413</sup>

A district court recently entered an order barring dozens of Florida counties from continuing to violate the VRA by failing to provide bilingual voting assistance to voters of Puerto Rican descent.<sup>414</sup> The plaintiffs were repeatedly forced to pursue further relief after a number of election officials refused to comply with the order and make multi-lingual assistance available, asserting, for example, that “the small number of voters requesting Spanish-language ballots did not justify the cost.”<sup>415</sup> Florida was previously sued in 2000 by the Department of Justice for failure to provide language materials and in 2009 by LatinoJustice for failure to provide assistance to voters from Puerto Rico as required.<sup>416</sup> District Judge Mark Walker noted in his order that, “[i]t is remarkable that it takes a coalition of voting rights organizations and individuals to sue in federal court to seek minimal compliance with the plain language of a venerable 53-year-old law.”<sup>417</sup>

The Subcommittee also received widespread reports of non-compliance with the VRA’s language access requirements, in numerous states and localities, and often involving troubling evidence or inference of discriminatory intent.<sup>418</sup> Ms. Romero-Craft provided testimony of examples in Florida and Georgia, such as Liberty County, Georgia’s failure to provide

<sup>411</sup> *U.S. v. Berks Cnty., Pa.*, 277 F. Supp. 2d 570, 579-80 (E.D. Pa. 2003).

<sup>412</sup> *Id.*

<sup>413</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Kira Romero-Craft at 5.

<sup>414</sup> *Madera v. Detzner*, 325 F. Supp. 3d 1269 (N.D. Fla. 2018).

<sup>415</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Kira Romero-Craft at 6-7.

<sup>416</sup> *Voting Rights and Election Administration in Florida*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), written testimony of Juan Cartagena at 3, discussing a 2002 Department of Justice suit against Osceole County resulting in a settlement to stop the discriminatory failure to provide voting access to Spanish-speaking voters under Section 2; also discussing a 2009 LatinoJustice suit against Volusia County to provide Spanish-language assistance to Puerto Rican voters under Section 4(e), which was settled.

<sup>417</sup> *Rivera Madera v. Detzner*, Slip Op. at 25 (Sept. 7, 2018).

<sup>418</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Kira Romero-Craft at 7-8; written testimony of Terry Ao Minnis at 7-8; written testimony of Matthew L. Campbell at 21-

Spanish-language voting materials and services despite citizens of Puerto Rican descent comprising nearly five percent of the county’s total population.<sup>419</sup> In testimony provided in the 116<sup>th</sup> Congress, Sean Young of the ACLU of Georgia testified that Hall County, Georgia was required to provide Spanish language materials under Section 4(e), as all counties are, but the board refused.<sup>420</sup> One study found that only 68.5 percent of jurisdictions fully complied with the Voting Rights Act’s language access requirements with respect to the provision of Spanish language materials.<sup>421</sup>

Jerry Vattamala of AALDEF testified to several examples of jurisdictions’ failure to provide language access materials to Asian American voters. For example, AALDEF filed a federal complaint on June 3, 2021, against the City of Hamtramck, Michigan, for its failure to comply with the requirements as a covered jurisdiction under Section 203 for Hamtramck to provide translations of all voting information and materials, including election websites, and oral language assistance for Bangladeshi voters in Bengali.<sup>422</sup>

In another example, Mr. Vattamala highlighted jurisdictions’ failure to ensure equal access to interpreters or through hostile treatment or discrimination by poll workers such as AALDEF discovered when monitoring the primary election in Malden, Massachusetts, in March 2020, a jurisdiction covered under Section 203 for Chinese language assistance.<sup>423</sup> Ms. Minnis testified that, during the 2012 election, voters reported to the Election Protection Coalition that “they had been unlawfully prevented from obtaining language assistance at polling places from Suffolk County, New York, to New Orleans, Louisiana, and including an incident “in Kansas City, Missouri, where a poll worker asked a voter’s interpreter to leave the polling place and threatened her with arrest.”<sup>424</sup> Marcia Johnson-Blanco of the Lawyers’ Committee testified that, in the 2020 election, voters reported lack of or insufficient language assistance in Berks and York counties in Pennsylvania.<sup>425</sup> Ms. Johnson-Blanco testified that:

The most egregious instance occurred in York County, where election officials rather than provide needed language assistance (1) spoke slowly and used hand gestures and mimicry as a prerequisite to allowing voters to utilize an interpreter, (2) impeded interpreters’ conversations with voters by hovering over conversations

<sup>22</sup>; see also U.S. Comm’n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at 189-91.

<sup>419</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Kira Romero-Craft at 3.

<sup>420</sup> *Voting Rights and Election Administration in Georgia*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), hearing transcript, Sean J. Young at 40.

<sup>421</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Matt Barreto at 9.

<sup>422</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*, 117<sup>th</sup> Cong. (2021), written testimony of Jerry Vattamala at 6.

<sup>423</sup> *Id.* at 7.

<sup>424</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Terry Ao Minnis at 7.

<sup>425</sup> *Voting in America: Ensuring Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Marcia Johnson-Blanco at 13.

and interrupting interactions telling voters that they could not use the interpreter and (3) prevented voters from using their assistance of choice with casting their ballot.<sup>426</sup>

Repeated failure to provide bilingual voting materials is also, troublingly, particularly common in Native American communities, and has led to litigation. Section 203 covers 357,409 American Indians and Alaska Natives who reside in a jurisdiction where assistance must be provided in a covered Native language.<sup>427</sup> However, as Matthew Campbell of NARF testified, jurisdictions have often failed to provide the required translations or have failed to provide any language assistance at all, forcing costly lawsuits.<sup>428</sup> Mr. Campbell testified that this is exactly what happened in Alaska, which led to *Toyukak v. Treadwell*, “the first Section 203 case fully tried through a decision in thirty-four years.”<sup>429</sup>

Even after plaintiffs in Alaska obtained a consent agreement requiring Alaskan officials to provide adequate language assistance to Yu’pik-speaking voters, the attorneys had to repeatedly return to court to provide fulsome relief.<sup>430</sup> Documents produced in litigation showed that Alaskan officials made a “policy decision” not to comply with Section 203 in several jurisdictions, consciously choosing not to provide required language assistance.<sup>431</sup> In 2013, a group of tribal councils and Alaska Native voters charged Alaska state officials with continuing violation of the VRA and the Constitution for their refusal to provide information in Yu’pik that was available in English—in its ruling for the plaintiffs, the court confirmed that “officials’ negligence had produced egregious results—Yu’pik voters were deprived of any and all critical pre-election information.”<sup>432</sup>

In *Toyukak*, Alaska election officials denied Native voters language assistance despite a previous court finding in *Nick v. Bethel* that all voting information provided in English must be provided orally even if written translations are not required.<sup>433</sup> The court held in *Toyukak* that Section 203 should be interpreted as “merely changing the means by which voting information and materials is communicated to LEP American Indians and Alaska Natives, and Section 203 does not permit election officials to diminish the content and extent of information that must be provided.”<sup>434</sup> Mr. Campbell testified that the parties “worked together to produce a joint

<sup>426</sup> *Id.*

<sup>427</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Matthew L. Campbell at 20.

<sup>428</sup> *Id.*

<sup>429</sup> *Id.*

<sup>430</sup> *Hustings, Minnis & Senteno, Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities’ Votes*, NALEO, AAJC & MALDEF (Nov. 2019) at 55-56.

<sup>431</sup> *Id.* (citing James Thomas Tucker, Written Testimony Submitted in Connection With a Hearing of the House Judiciary Committee on Discriminatory Barriers to Voting 3, September 5, 2019, <http://docs.house.gov/meetings/JU/JU10/20190905/109887/HHRG-116-JU10-Wstate-TuckerJ20190905.pdf>).

“The State’s own documents show[ed] that the statewide bilingual coordinator was directed to deny language assistance to those areas. Coincidentally (or not so), the bilingual coordinator’s last day of employment was on December 31, 2012, the very day the *Nick [v. Bethel]* agreement ended.”

<sup>432</sup> *Id.* at 56.

<sup>433</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Matthew L. Campbell at 20.

<sup>434</sup> *Id.* at 21.

stipulation that aimed to remedy Alaska's Section 203 violations and included strong relief such as federal observers to document compliance efforts.”<sup>435</sup> Mr. Campbell testified further that:

Reports filed by federal observers in 2016 suggest that Alaska's efforts fell short of fully remedying the Section 203 violations and complying with the *Toyukak* Order... During the 2016 primary, federal observers documented there were no voting materials available in the covered Alaska Native language in six villages, and the “I voted” sticker was the only material in a Native language in two other villages. Alaska has made some improvements since *Toyukak* such as having bilingual poll workers available, but almost forty years of Section 203 violations cannot be remedied overnight and continued investment in language assistance for American Indian and Alaska Natives is crucial to ensuring Native voters have equal access to the election process.<sup>436</sup>

Alaska is not the only jurisdiction to have failed to comply with requirements to provide Native voters with language access. As Mr. Campbell’s testimony notes, San Juan County, Utah, is a covered county for the Navajo language, but the County has failed voters by refusing to comply with Section 203.<sup>437</sup> Additionally, in 2014 the County removed all language assistance by switching to a vote-by-mail system and providing no translated ballot information to LEP Navajo voters, many of whom received an English ballot they could not read and so they simply did not vote.<sup>438</sup> A settlement reached between the County and litigators restored the closed polling places and mandates the County provide the required language assistance.<sup>439</sup> Failure to provide access to Native language services has also impacted Native American voters in Arizona. Professor Patty Ferguson-Bohnee, Director of the Indian Legal Clinic at the Sandra Day O’Connor College of Law, testified before the Subcommittee in 2019 that in Arizona, in 2016, only one of nine jurisdictions covered under Section 203 for Native languages provided translated voter registration information in the covered language.<sup>440</sup>

## CONCLUSION

Congress has, at multiple junctures in history and in legislating, moved to protect the right to vote through increased access to language assistance. Congress recognized that access to

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<sup>435</sup> *Id.* at 20-21 (citing Federal Observer Reports for 2016 Elections, *Toyukak v. Treadwell*, No. 3:13-cv-00137, ECF No. 295, attachments 295-1 to 295-33 (D. Alaska Dec. 13, 2016)); *see also Navajo Nation v. Hobbs*, 18-CV-08329 (D. Ariz. 2019) (enforcing consent decree requiring Arizona Secretary of State and several county officials to provide Navajo language translations of certain election materials).

<sup>436</sup> *Id.* at 21.

<sup>437</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Matthew L. Campbell at 21.

<sup>438</sup> *Id.* at 22.

<sup>439</sup> *Id.*, *see also Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), written testimony of Kristen Clarke at 9.

<sup>440</sup> *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), written testimony of Patty Ferguson-Bohnee at 4-5, *citing Indian Legal Clinic, Arizona Native Vote – Election Protection Project: 2016 Final Report* at 34.

multi-lingual voting materials and assistance is critical to ensuring fair and equal access to the ballot. While the language access provisions of the Voting Rights Act remain intact following the Court’s decision in *Shelby County*, the evidence before the Subcommittee in both this Congress and the last is clear—significant gaps remain in adherence to the law and the provision of fair access to multi-lingual voting materials and assistance.

The failure to provide the required assistance is pervasive and creates significant barriers to accessing the ballot, barriers that fall disproportionately on LEP voters, who are more likely to be minority voters. Additionally, as Jerry Vattamala of AALDEF testified, protecting access to language materials and assistance on a case-by-case basis is unsustainable and insufficient:

Individual affirmative cases require a large amount of human and financial resources which limit the reach and scope of work that organizations like AALDEF can do. For example, in the *OCA v. Texas* case that AALDEF brought against the state of Texas for violating Section 208 of the Voting Rights Act, it took more than three years to litigate from client intake to final decision, and required hundreds of hours of attorney time.<sup>441</sup>

The evidence presented before the Subcommittee demonstrates that ensuring access to multi-lingual materials and assistance warrants increased protections.

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<sup>441</sup> *Voting in American: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021)*, written testimony of Jerry Vattamala at 10.

# CHAPTER SIX

## *Polling Place Closures, Consolidations, Relocations, and Long Wait Times at the Polls*

### BACKGROUND

Prior to the Supreme Court’s decision in *Shelby County*, states and localities in covered jurisdictions were required to notify voters well in advance of polling location closures, to prove those changes would not have a disparate impact on minority voters, and to provide data to the DOJ about the impact on voters.<sup>442</sup> In the years since *Shelby County* was decided, states that were previously covered by the VRA have closed hundreds of polling locations.

Issues related to polling place locations, quality, accessibility, and ensuing long wait times to vote are, unfortunately, well-documented and pervasive. For example, at the Subcommittee’s 2019 listening session in Brownsville, Texas, Mimi Marziani, President of the Texas Civil Rights Project (“TCRP”) testified that, “long lines and late openings are, unfortunately, such a common feature of Texas elections that they are deemed ‘typical’ by election officials.”<sup>443</sup>

Marcia Johnson-Blanco of the Lawyers’ Committee reported in testimony before the Subcommittee that, in Pennsylvania, two of the top three issues reported to Election Protection on Election Day 2020 were long lines, particularly in communities of color, and late polling place openings.<sup>444</sup> Ms. Johnson-Blanco also noted issues of long lines being reported in Georgia, Texas, California, and Wisconsin throughout the 2020 primaries and general election.<sup>445</sup>

Polling location closures and movements can and do disproportionately burden minority voters, whether by intent or effect. Poor polling place locations, lack of availability, and a lack of resources leads to minority voters facing longer lines than White voters at the polls. Polling place closures are harmful to voter turnout, especially the turnout of minority voters—waiting in a long line to vote can make a voter less likely to turn out in future elections.<sup>446</sup> Disparities in Election Day experiences between minority voters and White voters are a persistent problem. Kevin Morris of the Brennan Center noted in testimony before the Subcommittee that “[o]ver

<sup>442</sup> U.S. Comm’n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at 169.

<sup>443</sup> *Voting Rights and Election Administration in Texas: Listening Session Before the Comm. on House Administration*, 116<sup>th</sup> Cong. (2019), written testimony of Mimi Marziani.

<sup>444</sup> *Voting in America: Ensuring Free and Fair Access to the Ballot: Hearing Before the Subcomm. on Elections*, 117<sup>th</sup> Cong. (2021), written testimony of Marcia Johnson-Blanco at 13.

<sup>445</sup> *Id.*

<sup>446</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot: Hearing Before the Subcomm. on Elections*, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Stephen Pettigrew.

the past decade, scholars have consistently noted that racial minorities wait longer to cast their ballots on election day than White voters.”<sup>447</sup>

The disparity in polling place accessibility and wait times is then compounded by the disparate impact of other practices discussed in this report such as voter ID accessibility, proper access to multi-lingual materials and assistance, voter purges, and restrictions on alternative opportunities to vote. As Ms. Marziani testified before the Subcommittee this Congress, “fewer polling places is one driver of long lines, a symptom of polling place inefficiencies that is compounded by other devices that make voting more onerous and time-consuming, such as Texas’ strict photo identification law (the same one originally struck down under Section 5).”<sup>448</sup>

While there may be legitimate reasons for closing, consolidating, or moving polling locations, without the disparate impact data, community consultation, and evaluation to support these changes, there is no preemptive way to ensure these closures do not discriminate against minority voters. Polling place closures, consolidations, relocations, and under-resourcing can and do lead to longer or extreme wait times or can require voters to drive for miles to reach a polling place.

In Georgia, for example, Gilda Daniels of the Advancement Project testified at the 2019 field hearing that at the Pittman Park voting sites in 2018 they received calls that lines were “reportedly 300 people deep with a wait time of 3.5 hours.”<sup>449</sup> The 2020 primary election in Georgia saw extremely long wait times yet again—voters waited in hours-long lines, some late into the night and the early hours of the next day.<sup>450</sup> Counties are regularly sued to extend the hours of polling locations to ensure all voters can cast a ballot. Voters in Georgia waited in lines so long they brought chairs to wait for the opportunity to cast their ballot. Volunteers provided food and water to people who had to wait in line for hours.

Polling place locations that necessitate traveling long distances are particularly burdensome, and unfortunately an all-too-common occurrence, for Native American voters. Movement toward mail-in voting, closure of polling locations, lack of polling places located on tribal lands, and moves toward consolidated vote centers can disproportionately impact and possibly disenfranchise Native voters who face barriers such as lack of access to transportation, lack of traditional residential mailing addresses, lack of access to reliable mail service and distance. When fighting to ensure their communities have equal opportunities to vote, many tribal

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<sup>447</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Kevin Morris at 2.

<sup>448</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, written testimony of Mimi Marziani at 3.

<sup>449</sup> *Voting Rights and Election Administration in Georgia*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), written testimony of Gilda Daniels at 5.

<sup>450</sup> Stephen Fowler, *Why Do Nonwhite Georgia Voters Have To Wait In Line For Hours? Too Few Polling Places*, NPR (Oct. 17, 2020), <https://www.npr.org/2020/10/17/924527679/why-do-nonwhite-georgia-voters-have-to-wait-in-line-for-hours-too-few-polling-pl>.

communities are at the mercy or discretion of county officials who choose where to place the polling locations and the level of ballot access.<sup>451</sup>

Evidence presented before the Subcommittee at hearings spanning this Congress and the last, and discussed below, shows that pervasive polling place location issues, long wait times, and under-resourcing have a disproportionate, discriminatory, and suppressive effect on the ability of minority voters to freely and fairly exercise their right to vote.

## **THE DISPROPORTIONATE AND DISCRIMINATORY BURDEN AND IMPACT OF POLLING PLACE CLOSURES, CONSOLIDATIONS, AND RELOCATIONS, WAIT TIMES, AND LACK OF RESOURCES ON MINORITY VOTERS**

### **Polling Place Availability and Accessibility**

No matter the reason, polling place closures, consolidations, or relocations, or a lack of adequate resourcing can lead to long lines and extreme wait times or can require voters to drive for miles to reach a polling place. This burden often falls disproportionately on minority voters. Without the disparate impact data and analysis previously required under the Voting Rights Act preclearance process, community consultation, and evaluation to support these changes, there is no longer a preemptive mechanism to ensure these closures do not discriminate against minority voters.

As Jesselyn McCurdy, Managing Director of Government Affairs for the Leadership Conference testified, “[v]oting discrimination and disenfranchisement takes many forms, but one tangible way to quash Americans’ voices is to physically remove the very locations where ballots are cast and counted. While they do not garner the attention that voter purges and ID laws do, polling place closures can be just as disenfranchising.”<sup>452</sup>

One of the starker examples of this occurred recently during the 2020 primary election, when voters in Milwaukee, Wisconsin, were forced to stand in line for hours at one of only five polling places open across the city to cast their ballot on Election Day, after failing to receive

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*“Nowhere are the participatory consequences of election administration clearer than in the consolidation of polling places. There are few topics on which there is near-unanimity among political scientists, but the negative turnout effect of closing polling places is one of them.”*

— Kevin Morris, Researcher, Brennan Center for Justice

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<sup>451</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting:* Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Patty Ferguson-Bohnee at 11.

<sup>452</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot:* Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Jesselyn McCurdy at 2-3.

absentee ballots in the mail and just weeks after officials shut down 175 sites.<sup>453</sup> The make-up of Milwaukee is disproportionately Black—Madison, a much less populous town with a whiter population, boasted 66 polling sites to Milwaukee’s 5.<sup>454</sup>

According to an analysis by Demos and All Voting is Local, Milwaukee is home to 60.32 percent of Wisconsin’s Black voters and 29.69 percent of the state’s Hispanic voters.<sup>455</sup> These polling place closures had a measurable disenfranchising effect. A peer-reviewed, journal article by the Brennan Center’s Kevin Morris and Peter Miller found that the closures in Milwaukee depressed turnout by more than 8 percentage points overall—and by about 10 percentage points among Black voters.<sup>456</sup>

The disenfranchising effects of polling place closures or movements have been documented by studies as well. Studies have shown that the closure or relocation of a polling location reduces turnout by one to two percentage points,<sup>457</sup> meaning that the closure or relocation of polling locations that disproportionately serve minority voters also serves to disproportionately reduce turnout of minority voters.

These burdens are attributable to the fact that the closures or relocations force voters to travel farther to vote, which can be particularly burdensome on Latino, Native American, Asian/Pacific Islander, and Black voters who disproportionately lack access to a private vehicle.<sup>458</sup> Distances to polling locations can be particularly burdensome for Native American voters living on rural, tribal lands, with some voters being forced to travel tens of miles to reach their polling location. Accessible polling locations are also necessary for LEP voters to access the franchise, as some voters who need language access materials or assistance may need a physical polling place to best exercise their right to vote.

The closures of polling locations ticked up dramatically in states previously covered by the VRA following the Supreme Court’s decision in *Shelby County*. Ms. McCurdy testified that, without a fully functioning VRA and consistent oversight by the DOJ in reviewing proposed changes, election officials “have unfettered discretion to shut them down without providing any valid reason.”<sup>459</sup> A September 2019 report prepared by The Leadership Conference Education Fund found that states and localities that were previously covered by Section 5 of the VRA closed **1,688 polling places** between 2012 and 2018, almost double the rate identified

<sup>453</sup> *Id.* at 3.

<sup>454</sup> *Id.*

<sup>455</sup> Shruti Banerjee & Dr. Megan Gall, *COVID-19 Silenced Voters of Color in Wisconsin*, Demos (May 14, 2020), <https://www.demos.org/blog/covid-19-silenced-voters-color-wisconsin>.

<sup>456</sup> Kevin Morris & Peter Miller, *Voting in a Pandemic: COVID-19 and Primary Turnout in Milwaukee, Wisconsin*, Urb. Aff. Rev., (Apr. 13, 2021), <https://journals.sagepub.com/doi/full/10.1177/10780874211005016>; Kevin Morris, *Did Consolidating Polling Places in Milwaukee Depress Turnout?*, Brennan Center for Justice (June 24, 2020), <https://www.brennancenter.org/our-work/research-reports/did-consolidating-polling-places-milwaukee-depress-turnout>.

<sup>457</sup> Jesse Yoder, *How Polling Place Changes Reduce Turnout: Evidence from Administrative Data in North Carolina* (Aug. 14, 2019) (unpublished manuscript).

<sup>458</sup> Hustings, Minnis & Senteno, *Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities’ Votes*, NALEO, AAJC & MALDEF (Nov. 2019) at 44.

<sup>459</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Jesselyn McCurdy at 3.

in 2016.<sup>460</sup> The Leadership Conference found that, in 2018 alone, there were 1,173 fewer polling places than there were in the previous 2014 midterm election.<sup>461</sup> Another study found that by 2020 approximately 21,000 polling places that served voters on Election Day have been eliminated nationwide.<sup>462</sup>

Through public records requests and data provided by the Center for Public Integrity, the Campaign Legal Center (“CLC”) has continued to document polling place closures in Louisiana, Mississippi, and Alabama. For example, Danielle Lang, Director of Voting Rights at the Campaign Legal Center testified that:

Since *Shelby County*, Louisiana has seen a steady decline in polling place access, especially for urban communities. For example, Jefferson Parish, Louisiana’s largest parish, has seen an 8.7 percent *increase* in the number of Black registered voters between 2012 and 2020 but a 15 percent *decrease* in the number of polling places.<sup>463</sup>

CLC also found that counties in Mississippi and Alabama displayed a similar pattern. For example:

Lauderdale County, Mississippi—which is 44 percent Black—closed 20 percent of its polling places between 2012 and 2020, even though the county’s citizen voting age population increased by 3 percent. And Shelby County, Alabama—namesake of the Supreme Court decision—closed roughly 10 percent of its polling places between 2012 and 2020, despite an increase of almost 13 percent in the county’s citizen voting age population.<sup>464</sup>

Ms. McCurdy, of the Leadership Conference testified before the Subcommittee that “[p]olling place closures did not seem to vary to meet the different demands of each type of election; indeed, 69 percent of closures (1,173) occurred *after* the 2014 midterm election in anticipation of the presidential election, which would necessarily bring higher turnout in communities of color.”<sup>465</sup> One would have reasonably expected the number of available polling places to increase to correspond to the anticipated higher turnout. Ms. McCurdy further testified, however, that “[t]his appears to be no accident: as pollsters predicted greater turnout for the 2018 midterm, counties with a history of discrimination began shutting down access to voting booths at an alarming rate.”<sup>466</sup>

<sup>460</sup> *Democracy Diverted: Polling Place Closures and the Right to Vote*, The Leadership Conference Education Fund (Sept. 2019) at 10, <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf>.

<sup>461</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Jesselyn McCurdy at 3.

<sup>462</sup> *Democracy Diminished: State and Local Threats to Voting Post-Shelby County, Alabama v. Holder*, NAACP Legal Defense and Educational Fund, Inc. (as of Nov. 13, 2020) at 4, [“Democracy Diminished: State And Local Threats To Voting Post Shelby County, Alabama V. Holder \(As of November 13, 2020\)”](#).

<sup>463</sup> *Voting In America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Danielle Lang at 8.

<sup>464</sup> *Id.* 8-9.

<sup>465</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Jesselyn McCurdy at 4.

<sup>466</sup> *Id.*

As noted previously, under Section 5, covered jurisdictions were previously required to demonstrate that closures would not have a discriminatory impact on voters, and to notify voters of the closures when they were permitted to occur.<sup>467</sup> Now, post-*Shelby*, jurisdictions no longer need to notify voters of the change, nor is the DOJ required to analyze the impact of the proposed changes on minority voters.<sup>468</sup> Ms. McCurdy testified that:

All told, *Shelby County* paved the way for several previously covered states to each shut down hundreds of polling places: Texas shut down 750; Arizona shut down 320; and Georgia shut down 214. Quieter efforts to reduce the number of polling places without clear notice or justification spread throughout Louisiana (126), Mississippi (96), Alabama (72), North Carolina (29), and Alaska (6).<sup>469</sup>

Over both the 116<sup>th</sup> and 117<sup>th</sup> Congresses, the Subcommittee heard testimony about how polling place closures can directly target locations predominantly used by minority voters.

For example, in Irwin County, Georgia, the Board of Elections attempted to close the only polling place in the county’s sole Black neighborhood, contrary to non-partisan recommendations, while keeping open a polling place in a 99 percent white neighborhood.<sup>470</sup> In 2019, the City Council of Jonesboro, Georgia, voted to move the city’s only polling location to its police department without providing the public notice required and without taking into consideration the possible deterrent effect on minority voters.<sup>471</sup> Ms. Romero-Craft of LatinoJustice testified that Hall County, Georgia’s, decision to only reopen half of its early voting sites for the 2020 run-off election caused “substantial reductions and disproportionately burdened Latino voters.”<sup>472</sup>

Mimi Marziani of the Texas Civil Rights Project testified that, the best available evidence strongly suggests that many of the polling place closures that have taken place across Texas since *Shelby County* have disparately and negatively impacted communities of color.<sup>473</sup> Ms. Marziani testified that, “[i]n short, history and current data confirm that voters of Texas are not evenly affected by the State’s detrimental changes to polling place locations, operations and hours. Instead, Black and Latinx Texans will suffer a heavier burden, as they have time

<sup>467</sup> *Id.*

<sup>468</sup> *Id.*

<sup>469</sup> *Id.*

<sup>470</sup> *Voting Rights and Election Administration in Georgia*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), written testimony of Sean J. Young at 3.

<sup>471</sup> *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), written testimony of Hannah Fried at 4, *see also* Mark Niesse, *Groups Oppose Moving Voting Precinct to Jonesboro Police Station*, ATLANTA JOURNAL-CONSTITUTION (Oct. 8, 2019), <https://www.ajc.com/news/state-regional-govt-politics/groups-oppose-moving-voting-precinctjonesboro-police-station/rgeerwVyqS17uDWs0bp5vL/>.

<sup>472</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Kira Romero-Craft at 4.

<sup>473</sup> *Voting In America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Mimi Marziani at 4-5.

and again.”<sup>474</sup> Texas, a state with a population that is 39 percent Latino, 12 percent African American, and 1.4 percent Asian American, has closed 750 polling places since *Shelby*.<sup>475</sup>

The Texas example is particularly egregious. Ms. Marziani provided data that hundreds of polling places were closed before the 2016 presidential election, “significantly more in both raw number and percentage than any other state.”<sup>476</sup> In Galveston, Texas, 16 percent of its polling locations were closed in 2016, according to a plan that had initially been rejected by the DOJ because it discriminated against Black and Latino voters.<sup>477</sup> Three Texas counties closed between 75 and 80 percent of their total polling sites, ranking among the 10 counties with the highest percentage of poll closures in the country.<sup>478</sup>

Texas is not the only example. Ms. McCurdy testified that Arizona, a state where 30 percent of the population is Latino, 4 percent is Native American, and 4 percent is African American, has the most widespread reduction (-320) in polling places—“almost every county (13 of 15 counties) closed polling places after *Shelby County*—some on a staggering scale.”<sup>479</sup> Ms. McCurdy’s testimony noted that these closures occurred despite national news coverage of “the adverse impact of polling place reductions in Maricopa County in the 2016 presidential preference election, which forced voters to stand in line for five hours to cast a ballot.”<sup>480</sup>

Georgia—a state that is 31 percent African American, 9 percent Latino, and 4 percent Asian American—had 214 fewer polling places for the 2018 election than it did before *Shelby*.<sup>481</sup> Ms. McCurdy stated that Georgia counties have closed higher percentages of voting locations than any other state the Leadership Conference reviewed for their *Democracy Diverted* report.<sup>482</sup>

Gilda Daniels, the Director of Litigation at the Advancement Project, testified that her organization had collected data that, since 2012, Ohio had closed more than 300 polling locations across the state, a disproportionate number in urban areas.<sup>483</sup> Furthermore, Ms. Daniels testimony notes that, between 2016 and 2018, Cuyahoga County (Ohio’s second

<sup>474</sup> *Id.*

<sup>475</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Jesselyn McCurdy at 4.

<sup>476</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Mimi Marziani at 5, citing Memorandum from the Tex. Advisory Comm. to the U.S. Commc’n. on Civ. Rts. (May 30, 2018) at 9, <https://www.usccr.gov/pubs/2018/07-23-tx-voting-rights.pdf>.

<sup>477</sup> *Id.* citing Scott Simpson, *The Great Poll Closure*, Leadership Conference Education Fund (2016) at 11, <http://civilrightsdocs.info/pdf/reports/2016/poll-closure-report-web.pdf>.

<sup>478</sup> *Id.* citing Leadership Conf. Educ. Fund, *Democracy Diverted: Polling Place Closures and the Right to Vote* (2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf>.

<sup>479</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Jesselyn McCurdy at 5.

<sup>480</sup> *Id.*

<sup>481</sup> *Id.*

<sup>482</sup> *Id.*

<sup>483</sup> *Voting In America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Gilda Daniels at 13.

largest county) eliminated 41 polling locations and nearly 16 percent of all precincts changed location, harming a majority of Black communities.<sup>484</sup>

While some states are closing polling locations in the shift to the vote center model, the lack of preclearance requirements means these shifts are happening without the requisite analysis to ensure they do not discriminate against minority voters. Additionally, the shift to a vote center model does not necessarily explain all polling place closures.

For example, in Texas, Somervell, Loving, Stonewall, and Fisher counties all closed between 60 and 80 percent of their polling places without converting to a vote center model. According to Ms. Marziani’s testimony, each of these counties has a large Latinx population.<sup>485</sup> Following the November 2018 General Election, TCRP conducted a comprehensive review of county compliance with provisions of the state Election Code and the Voting Rights Act—they found that many counties, regardless of size or polling place model, were out of compliance with elections laws. Texas was unlawfully short as many as 270 polling places in a total of 33 counties that contained four million registered voters collectively in 2018.<sup>486</sup>

Additionally, Kevin Morris of the Brennan Center, testified that although more than half of all states have statutes detailing minimum standards for the number of polling places, many states simply do not comply with their own laws.<sup>487</sup> Mr. Morris stated that, for example, his team uncovered evidence that “more than 40 percent of precincts in Illinois had more registered voters assigned to than allowed under state law, as did nearly a quarter of precincts in Michigan.”<sup>488</sup>

Standards for polling place locations can also be crafted in a way that is discriminatory toward minority voters. For example, Ms. Marziani testified that an earlier version Texas’ State Bill (SB) 7, which moved through the State House but has not been signed into law, included a provision that would have created a formula to distribute polling places that would pull polling places away from communities of color. Ms. Marziani testified that the *Texas Tribune* found

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*“And, the individual stories we hear are heart-breaking. In March 2020 alone, we heard from a woman with disabilities in Travis County who physically could not wait in line and was disenfranchised; elderly voters in Harris County nearly fainting in the hot sun; a mother and son waiting over five hours to cast their ballot.”*

— Mimi Marziani, President, Texas Civil Rights Project

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<sup>484</sup> *Id. citing* Daniel Ortiz, Outreach Dir., Policy Matters Ohio, Testimony at the Ohio People’s Hearing (2019) and Mike Brickner, Ohio State Dir., All Voting is Local, Testimony at the Ohio People’s Hearing (2019).

<sup>485</sup> *Voting In America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot:* Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Mimi Marziani at 6.

<sup>486</sup> *Id.*

<sup>487</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Voter to Interfere with Free and Fair Access to the Ballot:* Hearing before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Kevin Morris at 4.

<sup>488</sup> *Id.*

that, of the 13 State House districts in Harris County that would lose polling sites under this formula, all but one has a majority non-white voting-age population.<sup>489</sup>

At the time of this report, the Texas state legislature has returned for a special session, during which the Republican-led legislature is attempting to once again take up restrictive voting legislation.<sup>490</sup> The bills moving through the State House and Senate contain numerous provisions that restrict access to the ballot and voting opportunities, including, for example, putting limitations on polling places so as to ban drive-thru voting options.<sup>491</sup> Texas Democrats have departed the state to deny a quorum at the legislature in order to block the voting restrictions bill.<sup>492</sup>

For Native American voters, the location of polling places, consolidations, and the distance to polling locations is a significant issue. In their 2020 Report, NARF wrote that “Native voters generally must travel greater distances to get to their polling places than non-Native voters living in the same counties.”<sup>493</sup> NARF goes on to report that often, polling places are located in non-Native county seats or non-Native communities, and in many cases the more populous Native communities are denied in-person voting on tribal lands, requiring them to travel off the reservation to vote.<sup>494</sup>

According to testimony from Professor Ferguson-Bohnee, Director of the Indian Legal Clinic at the Sandra Day O’Connor College of Law, in a 2018 survey conducted by the Native American Voting Rights Coalition found 10 percent of respondents in New Mexico, 15 percent in Arizona, 27 percent in Nevada, and 29 percent in South Dakota identified distance from polling locations as one of the many problems associated with in-person voting.<sup>495</sup> When polling locations or voting opportunities are located hours away it effectively amounts to no access for Native American voters. Professor Ferguson-Bohnee notes that the federal district court in Nevada acknowledged this reality when it found that a polling location 16 miles away from the Pyramid Lake Paiute Reservation constituted an undue burden on voters.<sup>496</sup>

Nevada is not the only state where Native American voters face a disproportionate burden when it comes to polling place access—in 2016, Native American voters in Nevada and Utah had to travel over 100 miles to their nearest polling locations.<sup>497</sup> In Mohave County, Arizona, most residents in the County lived near one of the 3 locations established for in-person early voting, however, for the Kaibab-Paiute Tribe the closest of the three locations was 285 miles

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<sup>489</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Voter to Interfere with Free and Fair Access to the Ballot*: Hearing before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Mimi Marziani at 12-13.

<sup>490</sup> Alex Ura, *What’s in the new voting restriction legislation introduced in the Texas House and Senate*, TEX. TRIBUNE (July 8, 2021), <https://www.texastribune.org/2021/07/08/texas-voting-bill-special-session/>.

<sup>491</sup> *Id.*

<sup>492</sup> Alex Ura and Cassandra Pollock, *Texas House Democrats flee the state in move that could block voting restrictions bill, bring Legislature to a halt*, TEX. TRIBUNE (July 12, 2021), <https://www.texastribune.org/2021/07/12/texas-democrats-voting-bill-quorum/>.

<sup>493</sup> Tucker et al., *Obstacles at Every Turn: Barriers to Political Participation Faced By Native American Voters*, Native American Rights Fund (2020) at 90.

<sup>494</sup> *Id.*

<sup>495</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Patty Ferguson-Bohnee at 12.

<sup>496</sup> *Id.* (citing *Sanchez v. Cegavske*, 214 F. Supp. 3d 961, 976 (D. Nev. 2016)).

<sup>497</sup> *Id.*

away and required on-reservation voters to travel for over 5 hours if they wanted to vote early in person.<sup>498</sup>

In October 2020, NARF and the ACLU of Montana filed suit against Pondera County election officials on behalf of Blackfeet Nation for failing to provide a satellite voting location on the reservation, depriving Tribal members of the same access to voting as White voters.<sup>499</sup> According to the ACLU of Montana, the County offered in person voting between 60 to 80 miles away for Blackfeet Nation residents in the county seat—the suit resulted in a settlement agreement three days after filing in which Pondera County agreed to establish a satellite election office in Heart Butte.<sup>500</sup>

At the Subcommittee’s 2019 hearing in the Dakotas, Roger White Owl, Chief Executive Officer of the Mandan Hidatsa and Arikara Nation, testified that MHA Nation does not have enough polling places, “[w]ith only a couple of polling places, many Tribal members had to drive 80 to 100 miles round trip to cast their vote. This is unacceptable.”<sup>501</sup>

### **Long Wait Times and Inadequate Resourcing at the Polls**

When minority voters do cast their ballot at a polling place, they are also more likely to face longer lines and wait times to do so. Dr. Stephen Pettigrew of the University of Pennsylvania testified before the Subcommittee that:

The most basic impact of waiting in a line is the time burden placed upon the voter—what has been referred to as a ‘time tax.’ Compared to those who live in areas with consistently short lines, voters who live in areas with chronically long lines must sacrifice more of their time to exercise their right to vote. This can be a particular burden for people who have less flexibility in their schedule, whether because they have constraints in their work schedule or because they have childcare or eldercare responsibilities.<sup>502</sup>

Furthermore, Kevin Morris of the Brennan Center testified that, “[o]ver the past decade, scholars have consistently noted that racial minorities wait longer to cast their ballots on election day than White voters.”<sup>503</sup>

Not only do minority voters face, on average, longer wait times, they also are more likely to experience wait times exceeding 60 minutes, a wait widely recognized as unacceptable, with one analysis finding that a voter living in a non-white neighborhood is more than 6 times

<sup>498</sup> *Id.*

<sup>499</sup> *Id.* at 11 (citing *Blackfeet Nation v. Stapleton*, No. 4:20-CV-0095 (D. Mont. 2020).

<sup>500</sup> *Blackfeet Nation v. Stapleton*, ACLU Montana (filed Oct. 9, 2020), <https://www.aclumontana.org/en/cases/blackfeet-nation-v-stapleton>; see also *After Lawsuit From The Blackfeet Nation, Pondera County Agrees to Satellite Office on Reservation*, ACLU Montana (Oct. 14, 2020), <https://www.aclumontana.org/en/news/after-lawsuit-blackfeet-nation-pondera-county-agrees-satellite-office-reservation>.

<sup>501</sup> *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), hearing transcript, Roger White Owl at 21.

<sup>502</sup> *Voting In America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Stephen Pettigrew at 7.

<sup>503</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Voter to Interfere with Free and Fair Access to the Ballot*: Hearing before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Kevin Morris at 2.

more likely to wait 60 minutes or more to vote than a voter living in a predominantly White neighborhood.<sup>504</sup>

In testimony before the Subcommittee, Dr. Pettigrew stated that, “[a] voter’s race is one of the strongest predictors of how long they wait in line to vote: non-white voters are three times more likely than White voters to wait longer than 30 minutes and six times as likely to wait more than 60 minutes.”<sup>505</sup> Dr. Pettigrew’s testimony and research also find that line length is a persistent and systemic problem—the same places with long lines in one election are more likely to have long lines in subsequent elections.<sup>506</sup>

Furthermore, Dr. Pettigrew’s research finds that the wait times gap between White and non-White voters bridges the simple explanation of a rural-urban divide, though that divide also exists. Dr. Pettigrew testified that, even within a given urban, suburban, or rural county, lines tend to be longer in neighborhoods and precincts with higher concentrations of non-White voters.<sup>507</sup>

A report by the Brennan Center shows similar outcomes. Mr. Morris testified that the gaps cannot be explained solely by differences in income, age, or education, and that the gaps are large, stating, “our report showed that in 2018, Black and Latino voters were more than one-and-a-half times as likely to wait 30 or more minutes as White voters.”<sup>508</sup> According to the Brennan Center, in the 2018 election, for example, 6.6 percent of Latino voters and 7 percent of Black voters reported waiting 30 or more minutes or longer to vote on Election Day, whereas only 4.1 percent of White voters reported waiting 30 minutes or more.<sup>509</sup>

Additionally, in a recent report on equity in our democracy, the Brennan Center further reported:

A 2020 analysis by the Brennan Center reported that Latino and Black voters were more likely to find themselves in the longest lines on Election Day than their White counterparts: “Latino voters waited on average 46 percent longer than White voters, and Black voters waited on average 45 percent longer than White voters.” Stanford University political science professor Jonathan Rodden analyzed data collected by Georgia Public Broadcasting/ProPublica and found that the average wait time after 7:00 p.m. across Georgia was 51 minutes in polling places that were 90 percent or more nonwhite, but only six minutes in polling places that were 90 percent White.<sup>510</sup>

<sup>504</sup> Stephen Pettigrew, *The Racial Gap in Wait Times: Why Minority Precincts Are Underserved by Local Election Officials*, 132 POL. SCI. Q. 527, 536 (2017).

<sup>505</sup> *Voting In America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Stephen Pettigrew.

<sup>506</sup> *Id.*

<sup>507</sup> *Id.*

<sup>508</sup> *Voting In America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Kevin Morris at 3.

<sup>509</sup> Klain et al., *Waiting to Vote: Racial Disparities in Election Day Experiences*, BRENNAN CENTER FOR JUSTICE (June 3, 2020).

<sup>510</sup> Elizabeth Hira, Julia Boland, & Julia Kirschenbaum, *Equity for the People: S. I/H.R. 1 and the Fight for an Inclusive Democracy*, BRENNAN CENTER FOR JUSTICE (June 17, 2021) at 21, <https://www.brennancenter.org/our-work/research-reports/equity-people>.

Ms. Marziani further highlighted this in her testimony, stating that, in Texas for example:

Press reports indicated wait times as high as seven hours, ‘particularly in communities of color and on college campuses.’ ... Nationally, communities of color regularly wait nearly twice as long to vote as White voters, and in Texas, too, long lines disproportionately impact Black and Latinx Texans.<sup>511</sup>

Additionally, Keith Chen of the University of California, Los Angeles, found voters in Black neighborhoods waited longer to cast a ballot than voters in White neighborhoods, and were approximately 74 percent more likely to wait longer than half an hour.<sup>512</sup> Using data from the 2008 and 2012 elections, multi-state internet surveys of tens of thousands of voters revealed that both African American and Hispanic voters faced substantially longer wait times at the polls than White voters.<sup>513</sup> Other state-specific studies have shown that minority voters face disproportionately long lines relative to White voters.<sup>514</sup>

According to a report in the *New York Times*, this disparity continued in the 2020 election—“casting a vote typically took longer in poorer, less white neighborhoods than it did in whiter and more affluent ones.”<sup>515</sup>

Ms. McCurdy of the Leadership Conference also testified to this point. Ms. McCurdy stated that:

In previously covered jurisdictions, moreover, mass closures similarly resulted in long lines: In 2020, voters stood in line for hours in Phoenix, Arizona, and Atlanta, Georgia; Texas’ shuttering of 334 polling places — more than any other state — in majority-Latino neighborhoods forced voters to drive farther than White people from other areas. Indeed, across the country Black and Latino voters consistently reported longer wait-times than White voters.<sup>516</sup>

Scholars and stakeholders have demonstrated that the disproportionately long wait times faced by minority voters are often attributable to the differentially lower quality of the polling locations that serve a disproportionately large number of minority voters. For example, Dr. Pettigrew’s testimony states that “one of the reasons why non-White voters wait longer to vote is that fewer resources, such as poll workers and voting machines, are allocated to precincts with more non-white registrants.”<sup>517</sup> Studies have shown that election officials provide more

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<sup>511</sup> *Voting In America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Mimi Marziani at 4.

<sup>512</sup> *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), written testimony of Hannah Fried at 2, *citing* M. Keith Chen, Kareem Haggag, Devin G. Pope, Ryne Rohla, *Racial Disparities in Voting Wait Times: Evidence from Smartphone Data* (Sept. 4, 2019), <https://arxiv.org/abs/1909.00024>.

<sup>513</sup> Charles Stewart & Stephen Ansolabehere, *Waiting to Vote*, 14 ELECTION L. J. 47 (2015).

<sup>514</sup> E.g., Cottrell, Herron et al., *Voting Lines, Equal Treatment, and Early Voting Check-in Times in Florida*, STATE POLITICS & POLICY Q. (Aug. 12, 2020), <https://journals.sagepub.com/doi/abs/10.1177/1532440020943884>.

<sup>515</sup> Kevin Quealy and Alicia Parlapiano, *Election Day Voting in 2020 Took Longer in America’s Poorest Neighborhoods*, NY TIMES (Jan. 4, 2021), <https://www.nytimes.com/interactive/2021/01/04/upshot/voting-wait-times.html>.

<sup>516</sup> *Voting In America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Jesselyn McCurdy at 3.

<sup>517</sup> *Voting In America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Stephen Pettigrew.

poll workers and voting machines to disproportionately White precincts, relative to precincts that serve minority voters.<sup>518</sup> A study by the Brennan Center showed that counties that saw a declining population of White voters also saw declines in polling location resources, with counties where the population became whiter having 63 voters per poll worker, whereas counties that were becoming less White had 80 voters per poll worker.<sup>519</sup>

Equal distribution of resources alone, however, is not enough to address the disparate experience of minority voters. Mr. Morris testified that

Equalizing the *distribution* of polling place resources, in other words, is insufficient to equalize voters' experience on Election Day. To ensure equitable Election Day experiences and end the excessive lines and wait times faced by minority voters, administrators need to distribute relatively more and higher-quality resources to neighborhoods of color.<sup>520</sup>

Mr. Morris further stated that, “although voters of color already face the longest lines, on average, they make up a growing share of the jurisdictions with the fewest electoral resources”<sup>521</sup> and that “resource allocation patterns are on track to exacerbate, not mitigate, the racial wait gap in coming years.”<sup>522</sup>

Additionally, as noted elsewhere in this report, long wait times can be compounded by the disparate impact of the other practices discussed in this report. Mr. Morris testified for example, that the dynamic of inadequate resources “plays out especially clearly when it comes to language access.”<sup>523</sup> Mr. Morris testified that research at the Brennan Center “indicates that counties that have significant and growing populations of voters whose first language is not English, but have not met the threshold to provide language assistance under Section 203 of the VRA, usually provide little-to-no language assistance, leaving some communities under-resourced.”<sup>524</sup> Voter purges that remove eligible voters from the rolls may cause delays at the polling place as poll workers take time trying to locate the voter’s record, and purged voters are often required to cast provisional ballots—Mr. Morris testified that voters who cast a provisional ballot can take twice as long to cast their ballot as a traditional ballot.<sup>525</sup>

<sup>518</sup> Stephen Pettigrew, *The Racial Gap in Wait Times: Why Minority Precincts Are Underserved by Local Election Officials*, 132 POL. SCI. Q. 527 (2017); Michael Herron & Daniel A. Smith, *Precinct Resources and Voter Wait Times*, 42 ELECTORAL STUDIES 249 (2016).

<sup>519</sup> Klain et al., *Waiting to Vote: Racial Disparities in Election Day Experiences*, BRENNAN CENTER FOR JUSTICE (June 3, 2020); see also Matt Barreto et al., *Are All Precincts Created Equal: The Prevalence of Low-Quality Precincts in Low-Income and Minority Communities*, POL. RES. Q. (Sept. 2008) (reporting results from survey in Los Angeles finding that precincts serving Black, Latino, and Asian voters were more likely to have changed location and less likely to have adequate parking and handicap accessibility than precincts serving white voters).

<sup>520</sup> *Voting In America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Kevin Morris at 3.

<sup>521</sup> *Id.*

<sup>522</sup> *Id.*, see hearing transcript at 27.

<sup>523</sup> *Id.*, written testimony at 4.

<sup>524</sup> *Id.* (“Voters whose poll workers do not speak their language are at a serious disadvantage, even if their polling places are staffed with the same number of workers. Similarly, voters navigating ballots that are not written in their primary language may take longer to vote, leading to longer lines.”)

<sup>525</sup> *Id.* at 9.

In addition to imposing direct burdens on minority voters, longer wait times also impact the likelihood that a voter will vote in later elections, thereby disproportionately impacting and suppressing participation among minority voters. Voters who face long lines in one election are disproportionately likely not to vote in a subsequent election because of their adverse experience with the voting process.<sup>526</sup> This means that when minority voters face disproportionately long wait times in one election, then these same voters are disproportionately likely not to turnout in subsequent elections.<sup>527</sup>

Dr. Pettigrew testified that, “[b]ecause voters’ experiences at the polling place have downstream consequences on their future turnout behavior and their confidence in the electoral system, policies that widen the wait time gap between White and non-white voters have the potential to put a thumb on the electoral scale by reshaping the electorate.”<sup>528</sup>

For example, one study estimated that whereas African American voters comprise 9.7 percent of the electorate, they accounted for 22 percent of the voters who voted in 2012 but did not turnout in the 2014 election because of their adverse experience with long wait times.<sup>529</sup>

Dr. Pettigrew testified that, “[v]oters who waited between 30 and 45 minutes to vote were 1 percentage point less likely to turn out to vote in the next election, compared to voters who waited less than 15 minutes. When considering voters who waited more than 60 minutes, this impact increases to about 1.6 percentage points.”<sup>530</sup> Dr. Pettigrew notes that, “[w]hile these percentages may seem small, it is important to remember that in many elections million or tens-of-millions of voters experience long lines, meaning that future decreases in turnout can be in the hundreds-of-thousands.”<sup>531</sup>

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*“Additionally, because racial minorities are disproportionately likely to encounter a long line to vote, their turnout rate is disproportionately impacted...[I]n 2014, Black voters made up roughly 10 percent of voters, but over 20 percent of people who did not turn out because of a long line they experienced in 2012.”*

— Dr. Stephen Pettigrew, University of Pennsylvania

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<sup>526</sup> See Stephen Pettigrew, *The Downstream Consequences of Long Waits: How Lines at the Precinct Depress Future Turnout*, 71 ELECTORAL STUDIES (2021).

<sup>527</sup> *Id.*

<sup>528</sup> *Voting In America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Stephen Pettigrew at 2.

<sup>529</sup> See Stephen Pettigrew, *The Downstream Consequences of Long Waits: How Lines at the Precinct Depress Future Turnout*, 71 ELECTORAL STUDIES (2021).

<sup>530</sup> *Voting In America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Stephen Pettigrew at 8.

<sup>531</sup> *Id.*

“Additionally, because racial minorities are disproportionately likely to encounter a long line to vote, their turnout is disproportionately impacted. My research finds that in 2014, Black voters made up roughly 10 percent of voters, but over 20 percent of people who did not turn out because of a long line they experienced in 2012.”

## CONCLUSION

The evidence before the Subcommittee clearly illustrates the disproportionate, discriminatory effect polling place closures, consolidations, and relocations and under resourcing has on access to the ballot for minority voters. The 2013 bipartisan Presidential Commission on Election Administration set out a key recommendation that “as a general rule, no voter should have to wait more than half an hour in order to have an opportunity to vote”<sup>532</sup>—the evidence presented to the Subcommittee clearly shows that states and localities are falling far short of this, with minority voters disproportionately bearing the burden.

As Danielle Lang, Director of Voting Rights at the Campaign Legal Center stated, “[t]he quality of polling places—their number, location, accessibility, and resources—affects voter participation and confidence, thereby affecting the health and representative nature of American democracy.”<sup>533</sup> The Supreme Court recognized as much, as Ms. Lang testified, confirming that “the location and accessibility of polling places can have a direct impact on a voter’s ability to exercise their fundamental right to vote.”<sup>534</sup> Litigation is simply an inadequate remedy to combat the scale of polling place closures and to combat the significant harm borne disproportionately by minority voters. The data shows these issues are pervasive and have a significant suppressive effect on voters, demanding heightened scrutiny and protections to ensure every voter has access to the franchise.

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<sup>532</sup> *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration*, (Jan. 2014) at 14 (emphasis in original), [Amer-Voting-Exper-final-draft-01-09-14-508.pdf](https://eac.gov/Amer-Voting-Exper-final-draft-01-09-14-508.pdf) (eac.gov).

<sup>533</sup> *Voting In America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Danielle Lang at 4.

<sup>534</sup> *Id.* at 16 (citing *Perkins v. Matthews*, 400 U.S. 379, 387 (1971)).

# CHAPTER SEVEN

## *Restricting Opportunities to Vote*

### BACKGROUND

The 2020 general election was yet another proof point in what we knew to be true about administering elections in America—when voters are given a variety of options for when and how to cast their ballot outside of traditional in-person Election Day voting, they take advantage of those options. These options include casting a ballot by utilizing early in-person voting, curbside or drive-thru voting options, mail-in voting, or placing a completed ballot in a drop box. Undeniably, voting in-person on one Tuesday in November is impractical or impossible for millions of Americans.

Each of these alternative options are also secure. Election administrators across the country proved during the 2020 and prior elections that they can be administered in ways that reinforces the integrity of our elections even when utilized at record levels. Cybersecurity and election security officials, in fact, stated that the 2020 election was “the most secure in American history.”<sup>535</sup>

Early voting, and especially weekend early voting, is a critical tool to ensuring access to the ballot and reducing wait times at the polls. Absentee or no-excuse/mail-in voting is also crucial to providing voters with options for casting a ballot. In testimony submitted before the Subcommittee, Gilda Daniels of the Advancement Project stated, “[i]t has been proved that expanding early voting, vote by mail ballots, and drop box return options decrease the cost of voting” and making these options widely available can assist with turnout and smooth election administration.<sup>536</sup>

Studies have shown that restrictions on a variety of alternatives to voting in-person on Election Day have the potential to disproportionately burden minority voters. Moreover, restricting alternative opportunities to vote burdens Latino and Black voters, who disproportionately lack the ability to shift their working hours, and therefore are less able to vote on Election Day.<sup>537</sup> Restricting voting options can also burden Native American voters, who have non-traditional mailing addresses, long distances to travel to polling locations, often lack transportation, and can have inconsistent access to mail services. Failure to provide adequate language assistance

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<sup>535</sup> Joint Statement From Elections Infrastructure Government Coordinating Council & The Election Infrastructure Coordinating Executive Committees, Cybersecurity & Infrastructure Security Agency (Nov. 21, 2020), <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election>.

<sup>536</sup> Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Gilda Daniels at 21.

<sup>537</sup> See Stephen Pettigrew, *The Downstream Consequences of Long Waits: How Lines at the Precinct Depress Future Turnout*, 71 ELECTORAL STUDIES (2021).

also impedes the ability of LEP voters to fully understand and take advantage of voting options such as absentee voting or assessing what early voting options are available.<sup>538</sup>

While a variety of options for casting a ballot outside of the traditional Election Day are being utilized with increasing frequency by all voters, including minority voters, that increased use has also made these opportunities to vote the subject of targeted, suppressive voting laws in the post-*Shelby* era.

Michael Waldman of the Brennan Center testified that multiple states have reduced early voting days or sites used disproportionately by minority voters, such as in Ohio and Florida, where legislatures eliminated early voting on the Sundays leading up to Election Day after Black and Latino voters conducted successful “Souls to the Polls” turnout drives on those days.<sup>539</sup> Federal courts struck down early voting cutbacks in North Carolina, Florida, and Wisconsin because they were intentionally discriminatory.<sup>540</sup> Similar efforts are underway today, cutting or restricting early voting, mail-in voting, and ballot return methods, which will disproportionately impact and burden minority voters.

Under the false flag of “election integrity” and combating fraud, as of July 14, 2021, more than 400 bills have been introduced by lawmakers in 49 states to curb access to the vote.<sup>541</sup> As of the writing of this report, at least 18 states have enacted new laws containing provisions that will restrict access to voting and opportunities to vote.<sup>542</sup>

The Brennan Center reports that at least 16 mail-in voting restrictions in 12 states will make it more difficult for voters to cast mail ballots that count and at least eight states have enacted 11 laws that make in-person voting more difficult.<sup>543</sup> These laws come on the heels of an election in which reports show that the share of voters casting mail-in ballots far exceeded any other recent national elections, and the share of voters who reported going to a polling place on Election Day dropped to its lowest point in at least 30 years.<sup>544</sup> According to a report by the Brennan Center:

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*“And while everyone else gets to talk about it, I am the one who has to make it happen... My duty as a civil servant is to jump through hoops so that the voters don’t have to. No voter protections will ever be too onerous for me to implement when compared to the alternative of a weakened democracy.”*

— Isabel Longoria, Elections Administrator,  
Harris County, Texas

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<sup>538</sup> *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Multi-Lingual Support to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Terry Ao Minnis at 6.

<sup>539</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Michael Waldman at 4.

<sup>540</sup> *Id.*

<sup>541</sup> *Id.*

<sup>542</sup> *Id.*

<sup>543</sup> *Voting Laws Roundup: May 2021*, BRENNAN CENTER FOR JUSTICE (May 28, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021>.

<sup>544</sup> Nathaniel Rakich and Jasmine Mithani, *What Absentee Voting Looked Like In All 50 States*, FiveThirtyEight (Feb. 9, 2021), <https://fivethirtyeight.com/features/what-absentee-voting-looked-like-in-all-50-states/>.

Compared to 2016, Latino voters in 2020 quadrupled their participation in early and absentee balloting — a 224 percent increase, compared to a 165 percent increase for early and absentee ballots cast by voters overall. In the 13 most contested battleground states in the 2020 election, Asian American and Pacific Islander voters saw their early and absentee voting rise nearly 300 percent from 2016 levels.<sup>545</sup>

Laws enacted in Arkansas, Florida, Georgia, Iowa, and Montana restricting access to the ballot are already being challenged in court.<sup>546</sup>

Evidence presented before the Subcommittee across numerous hearings clearly illustrates that the cuts made to opportunities to vote have a disproportionate and discriminatory impact on minority voters and, in some cases, are pursued with a provable discriminatory intent.

## CUTBACKS AND RESTRICTIONS ON OPPORTUNITIES TO VOTE AND THE DISCRIMINATORY AND DISPROPORTIONATE BURDEN AND IMPACT ON MINORITY VOTERS

More than three-quarters of states offer some in-person early voting, but the number of days of availability varies across the nation. Despite the widespread, successful, secure use of early in-person voting in states across the country, early voting options have become the target of suppressive restrictions in the post-*Shelby* era.

Cutbacks and restrictions on opportunities to vote outside of what is considered traditional Election Day voting places a disproportionate burden on minority voters. Options such as early voting, mail-in voting, curbside voting, and drop boxes for ballot return all increase voter participation and were used at increasing rates by minority voters during the 2020 primary and general election.

Danielle Lang, Director of the Voting Rights Program at the Campaign Legal Center testified that, in 2020, polls showed that Black voters were the most likely to cast an early ballot and in 2016, Latino voters were the most likely to cast an early ballot.<sup>547</sup> Yet, without the requirement of preclearance to study and analyze changes in opportunities to vote for disparate impact, each of these voting options have become the target of suppressive and discriminatory cutbacks by state legislatures across the country.

Dr. Pettigrew testified before the Subcommittee that the number of options and opportunities voters have to cast their ballots is also a major contributor to the length of lines at the polls,<sup>548</sup> a burden that the previous section of this report clearly demonstrated falls disproportionately

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<sup>545</sup> Elizabeth Hira, Julia Boland, & Julia Kirschenbaum, *Equity for the People: S. I/H.R. 1 and the Fight for an Inclusive Democracy*, BRENNAN CENTER FOR JUSTICE (June 17, 2021) at 19.

<sup>546</sup> *Voting Laws Roundup: May 2021*, BRENNAN CENTER FOR JUSTICE (May 28, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021>.

<sup>547</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Danielle Lang at 23.

<sup>548</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Stephen Pettigrew at 6.

upon minority voters. Increasing hours of operation at polling places, increasing the number of days of early voting, and providing broader access to mail-in voting all decrease line length<sup>549</sup> and provide voters with opportunities to participate in democracy that meet them where they are in their daily lives.

## Early In-Person Voting

Dr. Michael Herron of Dartmouth College testified before the Subcommittee that options such as early in-person voting are a form of “convenience voting,” the implementation of which decreases the cost of voting for the voter.<sup>550</sup> Dr. Herron explains that “cost” in this sense “refers not necessarily to a monetary cost of participating in an election that would be borne by an individual but rather to the time, effort, and tasks that a voter must perform in order to vote.”<sup>551</sup> As he explained further, “[t]he higher the cost of voting in a state, the lower the turnout tends to be, all things equal.”<sup>552</sup>

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*“Early in-person voting access, which ensures that the fundamental right to vote does not hinge on one’s schedule on a single day, is an essential component of our voting system. Weekend voting days are particularly crucial for those who cannot afford to lose pay or risk job security to vote during working hours. And, unsurprisingly, voters of color take advantage of early voting options at higher rates.”*

—Danielle Lang, Director, Voting Rights,  
Campaign Legal Center

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Dr. Herron testified that early voting has expanded across the United States over the past several decades and, in this same time period, has been heavily used by minority voters.<sup>553</sup> Dr. Herron testified that, “[c]ertain types of voters tend to use different days of early voting,” and for this reason, “changes to election administration procedures that affect precisely when early voting is offered—i.e., on weekdays only as opposed to on both weekdays and weekends—will affect different racial groups differently.”<sup>554</sup> He testified further that, “changes to early voting hours that reduce pre-Election Day, Sunday voting opportunities should be expected to disproportionately affect Black voters” and that, if a state were to eliminate Sunday early

voting, “the cost of voting for Black voters would disproportionately increase compared to White voters given the relatively heavy use of Sunday early voting by Black voters.”<sup>555</sup>

One of the most striking examples of how changes and cutbacks to opportunities to vote can be wielded to disenfranchise minority voters comes again from North Carolina’s 2013 omnibus voting bill, dubbed the “monster law.” A study co-authored by Dr. Herron examining the

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<sup>549</sup> *Id.* at 6-7.

<sup>550</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot:* Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Michael Herron at 3-4.

<sup>551</sup> *Id.* at 4.

<sup>552</sup> *Id.*

<sup>553</sup> *Id.*

<sup>554</sup> *Id.* at 4-5.

<sup>555</sup> *Id.*

discriminatory impact of the state’s 2013 voting law, which, among other restrictions, cut 10 days of early voting, eliminated same-day voter registration, and eliminated out-of-precinct voting and was enacted within days of the Supreme Court’s decision in *Shelby County*, found that in virtually every election between 2009 and 2012, Black voters disproportionately relied on early voting relative to White voters.<sup>556</sup> Accordingly, the law’s restrictions on early voting disproportionately burdened Black voters.<sup>557</sup>

The North Carolina law specifically targeted one of two “Souls to the Polls” Sundays, early voting events traditionally held the Sunday before Election Day and heavily utilized by Black faith communities to get voters to the polls. The omnibus law was found by the courts to have targeted African American voters with “almost surgical precision.”<sup>558</sup> As Ms. Lang noted in her testimony, the Fourth Circuit Court of Appeals labeled the restriction on Sunday voting “as close to a smoking gun as we are likely to see in modern times.”<sup>559</sup>

Allison Riggs of the Southern Coalition for Social Justice testified that North Carolina’s attacks on early voting access did not end with the 2013 law. In 2018, North Carolina’s legislature enacted a separate law requiring all 100 counties within the state to offer uniform voting hours.<sup>560</sup> While sounding innocuous in theory, in practice it:

[H]ad a terrible effect on the ability of voters, particularly those of color, to get to a polling place. After the enactment of the “uniform hours requirement,” 43 of North Carolina’s 100 counties eliminated at least one early voting site, almost half reduced the number of weekend days when early voting was offered, and about two-thirds reduced the number of weekend hours, compared to 2014.<sup>561</sup>

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*“Thus, in what comes as close to a smoking gun as we are likely to see in modern times, the State’s very justification for a challenged statute hinges explicitly on race—specifically its concern that African Americans, who had overwhelmingly voted for Democrats, had too much access to the franchise.”*

*— Judge Diana Gribbon Motz,  
U.S. Court of Appeals, Fourth Circuit, N.C.  
State Conf. of the NAACP v. McCrory*

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<sup>556</sup> Michael D. Herron & Daniel A. Smith, *Race, Shelby County, and the Voter Information Verification Act in North Carolina*, 43 F.L.A. ST. L. REV. 464, 481, 489 (2016) (reporting, for example, that the early voting electorate was disproportionately Black in the 2008 and 2012 elections).

<sup>557</sup> *Id.*

<sup>558</sup> N.C. *State Conf. of NAACP v. McCrory*, 831 F.3d 204, 233 (4<sup>th</sup> Cir. 2016).

<sup>559</sup> *Voting Rights in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Danielle Lang at 25.

<sup>560</sup> *Voting in America: Ensuring Free and Fair Access to the Ballot*: Hearing before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Allison Riggs at 5.

<sup>561</sup> *Id.*, citing Democracy North Carolina, *Greater Costs, Fewer Options: The Impact of the Early Voting Uniform Hours Requirement in the 2018 Election*, <https://democracync.org/research/greater-costs-fewer-options-the-impact-of-the-early-voting-uniform-hours-requirement-in-the-2018-election/> (last visited Mar. 30, 2021).

Tomas Lopez of Democracy North Carolina testified before the Subcommittee in 2019 that, “this has produced several consequences in practice... [o]f the eight counties where a majority of voters are Black, four reduced sites, seven reduced weekend days, and all eight reduced the number of weekend hours during early voting. None saw increases in sites or weekend options.”<sup>562</sup>

Like North Carolina, Florida has engaged in a lengthy effort to restrict voting options predominately used by minority voters. A study co-authored by Dr. Herron, analyzing differential use of early voting in Florida, found that Black voters disproportionately voted early relative to White voters.<sup>563</sup> Ms. Lang testified that, in 2011, Florida’s legislature passed a bill eliminating Sunday voting on the Sunday immediately preceding Election Day—the bill coming after data from the 2008 Presidential election showed that:

Across all early voting days, the two days that featured the lowest white participation rates...both were Sundays,” but ‘on the first Sunday of early voting, the racial and ethnic group with the highest relative participation rate was African-American voters. And on the last Sunday, the group with the highest relative participation rate was Hispanic voters, followed by African-American voters.<sup>564</sup>

Because of Black voters’ disproportionate reliance on early voting, scholars found that Florida’s restriction on access to early voting in 2012 meant that “racial and ethnic minorities... were far disproportionately less likely to vote early in 2012 than in 2008.”<sup>565</sup> That was particularly true because African American voters were disproportionately likely to vote on the final Sunday before Election Day, which was among the early voting days eliminated by the law, as part of “Souls to the Polls” get-out-the-vote efforts.<sup>566</sup>

Also in Florida, in July 2018, a federal court struck down a state ban on early voting at public colleges. Hannah Fried, National Campaign Director of All Voting is Local, testified before the Subcommittee in October 2019 that a post-election analysis published by the Andrew Goodman Foundation found that “nearly 60,000 voters cast early in-person ballots at campus sites that advocates, including [All Voting is Local], helped secure” in the aftermath of the

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<sup>562</sup> *Voting Rights and Election Administration in North Carolina: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019)*, written testimony of Tomas Lopez at 4-5; see also Subcomm. on Elections, *Report on Voting Rights and Election Administration in America*, 116<sup>th</sup> Cong. (2019) at 52-53.

<sup>563</sup> Michael C. Herron & Daniel A. Smith, *Race, Party, and the Consequences of Restricting Early Voting in Florida in the 2012 General Election*, 67 POL. RES. Q. 646 (2014).

<sup>564</sup> *Voting Rights in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021)*, written testimony of Danielle Lang at 24.

<sup>565</sup> Michael C. Herron & Daniel A. Smith, *Race, Party, and the Consequences of Restricting Early Voting in Florida in the 2012 General Election*, 67 POL. RES. Q. 646 (2014) at 662.

<sup>566</sup> Michael C. Herron & Daniel A. Smith, *Souls to the Polls: Early Voting in Florida in the Shadow of House Bill 1355*, 11 ELECTION L.J. 331 (2012).

court’s decision,<sup>567</sup> however, Florida’s only public historically Black university was the only major public campus without an early voting site.<sup>568</sup>

An examination of on-campus early voting in the 2018 election performed by Professor Daniel Smith of the University of Florida found high rates of campus early voting among Hispanic and Black voters.<sup>569</sup> Moreover, Professor Smith found high rates of campus early voting among historically disenfranchised groups, including:

[A]lmost 30 percent of campus early vote ballots were cast by Hispanic voters, compared to just under 13 percent of early ballots cast at non-campus locations, and that more than 22 percent of campus early vote ballots were cast by Black voters, compared to 18 percent of early ballots cast at non-campus locations.

Ms. Lang testified that, in 2014, data from Georgia and North Carolina similarly showed that 53 percent of 25,000 early votes cast on the second Sunday before Election Day were from Black voters, compared with 27 percent of the votes cast by all early voters in the 2014 midterm elections.<sup>570</sup>

In Texas, just before the 2018 election, the NAACP Legal Defense Fund filed a motion for a temporary restraining order on behalf of Black students at the historically Black university Prairie View A&M University (“PVAMU”) in Waller County, Texas.<sup>571</sup> In 2018, the students sought to stop cuts to early voting hours, which would have left Prairie View without any early voting opportunities on weekends, evenings, or during the first week of early voting.

Janai Nelson, Associate Director-Counsel of LDF, testified to the Subcommittee that county officials refused the student requests to provide adequate early voting sites or hours and that County officials have “long discriminated against Black voters at PVAMU and in the majority-Black City of Prairie View, dating back to at least the early 1970s.”<sup>572</sup> In response to LDF’s ongoing case, however, county officials agreed in 2018 to add several hours of early voting in Prairie View.<sup>573</sup> LDF continues to litigate this case under its Section 2, Fourteenth, Fifteenth,

<sup>567</sup> *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), written testimony of Hannah Fried at 6.

In July 2018, when a federal court struck down Florida’s ban on early voting at public colleges, AVL worked with partners to secure early voting sites on college campuses throughout the state, with a focus on students of color. In particular, AVL helped place an early voting site at the predominantly Hispanic Florida International University. A post-election analysis published by the Andrew Goodman Foundation found that nearly 60,000 voters cast early in-person ballots at campus sites that advocates, including AVL, helped to secure. However, Florida A&M University (FAMU) – the state’s sole public Historically Black University – was the only major public campus without an early voting location.

<sup>568</sup> *Id.*

<sup>569</sup> See Dr. Daniel A. Smith, *On-Campus Early In-Person Voting in Florida in the 2018 General Election* (Aug. 9, 2019), The Andrew Goodman Foundation, [On-Campus-Early-In-Person-Voting-in-Florida-in-the-2018-General-Election-FINAL-8-9.pdf](https://andrewgoodman.org/wp-content/uploads/2019/08/On-Campus-Early-In-Person-Voting-in-Florida-in-the-2018-General-Election-FINAL-8-9.pdf) ([andrewgoodman.org](https://andrewgoodman.org)); and *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), written testimony of Hannah Fried at 6.

<sup>570</sup> *Voting Rights in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Danielle Lang at 25.

<sup>571</sup> *Voting Rights and Election Administration in America*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), written testimony of Deuel Ross at 6.

<sup>572</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Janai S. Nelson at 21-22.

<sup>573</sup> *Id.*

and Twenty-sixth Amendment claims on behalf of PVAMU students who were still denied equal and adequate voting opportunities in the election under the modified plan and parties are awaiting the trial court’s decision.<sup>574</sup>

In yet another example, in Dodge City, Kansas, voting was limited in 2018 to one polling location, which was outside of town and inaccessible via public transportation—Dodge City’s population is “60 percent Hispanic, and the voter turnout among Latinx voters is lower than the national average.”<sup>575</sup> Alejandro Rangel-Lopez, a high school student from Dodge City, testified before the Committee in 2019 that:

Dodge City only had one polling place for nearly 13,000 voters and while that’s bad enough to make it one of the most burdened polling places in our state, it was at the very least, centrally located, which can’t be said about the location chosen for the 2018 midterm election. That new location was south of town, outside the city limits. Worse, the county clerk sent out the wrong location address to new voters. [T]his new site wasn’t accessible by public transportation before we raised concerns. We believed these factors would negatively impact minority and low-income voters. … We rely on our elected officials to make the right choices and for a county clerk, that job was to make voting as easy as possible in the county she represents. Unfortunately, that’s not what happened. The clerk spent nearly \$100,000 of taxpayer money for legal fees fighting our efforts to make polling places more accessible.<sup>576</sup>

In Ohio, in addition to other cuts to voting opportunities, the state allows each county only one early, in-person voting site, regardless of population size—meaning Franklin and Cuyahoga Counties, home to Columbus and Cleveland, with populations of more than 1.2 million people each and significant populations of Black voters, are allotted the same, single early voting site as the smallest counties in the state, some of which are home to less than 15,000 people.<sup>577</sup> Inajo Davis Chappell, a Member of the Cuyahoga County Board of Elections, testified before the Subcommittee in 2019 that, “[b]ecause of the limit to this one location, voting lines are long, especially during the presidential election cycle. During periods of heavy voting, long lines can be seen wrapped around the building and down the street for several blocks.”<sup>578</sup>

LDF’s report, *Democracy Diminished*, notes an example of a Georgia state legislator making the intent behind his opposition to certain early voting in minority communities clear—when an early voting site was opening near a popular mall in Dekalb County in 2014, a state senator responded that “this location is dominated by African American shoppers and it is near several

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<sup>574</sup> *Id.* at 22.

<sup>575</sup> *Id.* at 23.

<sup>576</sup> *For the People: Our American Democracy*: Hearing Before the Comm. on House Admin., 116<sup>th</sup> Cong. (2019), written testimony of Alejandro Rangel-Lopez at 2.

<sup>577</sup> See Subcomm. on Elections, *Voting Rights and Election Administration in the United States of America*, 116<sup>th</sup> Cong. (2019) at 48-50.

<sup>578</sup> *Voting Rights and Election Administration in Ohio*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), written testimony of Inajo Davis Chappell at 2.

large African American mega churches,” and that he would “prefer more educated voters than a greater increase in the number of voters.”<sup>579</sup>

Cuts to early voting locations and opportunities to vote also negatively impact the ability of Native American voters to access the ballot. In NARF’s 2020 report on obstacles faced by Native American voters, they state that early voting can be a positive force for Native voters, if it accounts for the barriers that they face in participating in non-tribal elections—when officials coordinate with tribal governments and schools to provide information about voting locations and schedule, it can improve turnout.<sup>580</sup>

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Professor Ferguson-Bohnee testified that, while some election administrations are willing to work with tribes to increase access, others are not. The Pascua Yaqui Tribe in Arizona, for example, filed a lawsuit to restore the in-person early voting location on the reservation—and “[w]hile Pima County noted that the voting location would have cost \$5,000 to operate, and the Secretary of State was willing to cover the cost, the County denied the Tribe an early voting location.”<sup>581</sup> Professor Ferguson-Bohnee stated that, without the early voting location, “on-reservation voters who lacked a vehicle were required to take a two-hour roundtrip bus ride to cast an early ballot.”<sup>582</sup>

In South Dakota, a federal district court found that Pine Ridge Reservation residents “must travel, on average, twice as far as White residents to take advantage of the voter registration and in-person absentee voting services.”<sup>583</sup> In another example, NARF reported that, in Oklahoma, there is often only one early voting location per county—in the county seat—which is often not accessible for Native voters living in outlying areas, and “in the poorest areas of Nevada, where several reservations are located, no early voting or satellite voting locations were established.”<sup>584</sup>

*“Early voting opportunities located hours away effectively amount to no access to in-person early voting in light of the practical effects of requiring voters to travel such distances.”*

— Patty Ferguson-Bohnee, Director, Indian Legal Clinic, Sandra Day O’Connor College of Law (ASU)

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<sup>579</sup> Democracy Diminished: State and Local Threats to Voting Post-Shelby County, Alabama v. Holder, NAACP Legal Defense and Educational Fund, Inc. (as of Nov. 13, 2020) at 28.

<sup>580</sup> Tucker et al., *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, Native American Rights Fund(2020) at 92.

<sup>581</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Patty Ferguson-Bohnee at 11, citing *Pascua Yaqui Tribe v. Rodriguez*, No. CV-20-00432-TUC-JAS, 2020 WL 6203523 (D. Ariz. Oct. 22, 2020) (“Instead of spending \$5,000 to offer Native voters’ equal access to in-person early voting, the Pima County Recorder’s Office spent \$180,705.39 on legal fees to defend the decision.”)

<sup>582</sup> *Id.* at 11.

<sup>583</sup> *Id. citing Poor Bear v. Cty. of Jackson*, No. 5:14-CV-5059-KES, 2015 WL 1969760, at \*2 (D.S.D. May 1, 2015) (denying defendants’ Motion to Dismiss).

<sup>584</sup> Tucker et al., *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, Native American Rights Fund (2020) at 92-93.

Furthermore, in the 2016 general election in Arizona, there were a total of 89 early voting locations, only 23 of which were on reservations.<sup>585</sup> While off-reservation locations were open for multiple days, in contrast, early voting locations on the White Mountain Apache and San Carlos Apache reservations had only one day to vote early in-person, and only four hours on that one day.<sup>586</sup>

Professor Ferguson-Bohnee's testimony stated that, in Mohave County, Arizona, the county established three in-person early voting sites, and while most residents of the County lived near one of the locations, for the Kaibab-Paiute Tribe, the closet of the three locations was "located 285 miles away and required on-reservation voters to travel for over five hours if they wanted to vote early in-person."<sup>587</sup> In Navajo County, off-reservation voters had access to more than 100 hours of in-person early voting—while members of the Hopi Tribe living on-reservation in the County had access to only six hours of in-person early voting.<sup>588</sup> That represents only **six percent** of the amount of in-person voting opportunities on-reservation voters could access compared with off-reservation voters.

Increasing the options for how voters can vote early in-person can also increase voter participation and participation of minority voters. For example, Isabel Longoria, Elections Administrator for Harris County, Texas—home to Houston and the third largest county in the country—testified that the historic turnout of 1.68 million voters Harris County experienced in the November 2020 election was driven by innovative voting opportunities such as drive-thru voting (128,000 votes), 24-hour voting (16,000 votes), and a robust mail ballot program (179,000 votes), and that these methods of voting "helped promote voting in minority communities, which helped create a more accurate representation of communities in the county."<sup>589</sup>

Ms. Longoria testified that during the July 2020 and November 2020 elections, Harris County also kept its polls open until 10:00 p.m. on two evenings and open the entire night one evening.<sup>590</sup> Ms. Longoria testified that, of the Harris County voters who used expanded hours, 45 percent came from State House districts that are majority or plurality Black, Hispanic, or mixed-race districts.<sup>591</sup>

Harris County also opened multiple drive-thru voting sites that provided voting on the same machines and in the same manner as voting at all other in-person locations. Of the voters who used in-person drive-thru voting, 60 percent came from the majority or plurality Black, Hispanic, or mixed-race State House districts.<sup>592</sup> Though only 38 percent of early voters in the 2020 Presidential election were Black, Latino, or Asian, 53 percent of those communities

<sup>585</sup> *Id.*

<sup>586</sup> *Id.*

<sup>587</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Patty Ferguson-Bohnee at 12.*

<sup>588</sup> *Id.*

<sup>589</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Isabel Longoria at 1.*

<sup>590</sup> *Id.* at 3.

<sup>591</sup> *Id.*

<sup>592</sup> *Id.* at 3-4.

used drive-thru voting.<sup>593</sup> However, instead of promoting and celebrating these opportunities to vote, state legislators in Texas are also pursuing a suppressive voting bill that would undermine many of these alternative methods of voting.

Gilda Daniels, Director of Litigation at the Advancement Project, testified that voting statistics show that, in the November 2020 general election, Black voters in Georgia also used early voting on weekends at a higher rate than White voters in 43 of 50 of the state's largest counties.<sup>594</sup> That is 86 percent of the largest counties. The state also recently passed a restrictive bill that, among numerous troubling provisions, takes aim at access to early voting.

## Mail-in Voting and Ballot Return

Whether cast via the mail, returned via a ballot drop box, or returned at a polling place, mail-in voting is another opportunity to vote that gives voters control over when and how to cast their ballot that increases access to the franchise. Equitable mail-in voting practices increase voter participation; however, both restrictions on mail-in voting and mail-in voting implementation can be executed in a manner that is discriminatory toward minority voters or disproportionately burdens minority voters. Ms. Lang testified that “[a]bsentee voting is one of the most accessible, equitable, and secure methods of voting that states can implement.”<sup>595</sup> However, access to mail-in voting options is highly uneven—from 5 states that conduct vote-by-mail elections, to many who offer no-excuse absentee voting, to the 16 states that continue to limit access to mail-in voting options, locking many voters out of this option.

Use of mail-in voting increased significantly during the November 2020 election—approximately 43 percent of voters cast mail-in ballots, roughly twice the percentage of voters who cast mail-in ballots in the 2016 general election.<sup>596</sup>

Dr. Herron testified that this increase was not uniform across racial groups. For example, Dr. Herron noted that the shift in the mail-in voting rate in Florida for Black voters increased from almost 21 percent to around 39 percent, an **89 percent increase**, while the rate for White voters went from 31 percent to 44 percent, a 43 percent increase.<sup>597</sup> Dr. Herron testified that, while it remains to be seen whether mail-in voting usage will return to pre-pandemic levels, “[c]hanges to [vote-by-mail] voting procedures should not [be] expected to be racially neutral any more than changes to early voting procedures.”<sup>598</sup>

The inequitable access to mail-in voting options and different eligibility rules were put in stark relief during the 2020 election, a presidential primary and general election conducted during a once-in-a-century pandemic. For example, Ms. Lang testified that Texas’s restrictions on

<sup>593</sup> *Id.*, see hearing transcript at 71.

<sup>594</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Gilda Daniels at 14.

<sup>595</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Danielle Lang at 28-30.

<sup>596</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Dr. Michael Herron at 9.

<sup>597</sup> *Id.* at 9-10.

<sup>598</sup> *Id.* at 10.

eligibility for requesting and casting an absentee ballot “den[ies] the majority of Texans the ability to vote by mail—particularly Latino and younger voters.”<sup>599</sup> Ms. Lang testified that “Latino voters in Texas are significantly younger than the average Texas voting population, which means they are disproportionately unable to avail themselves of the over-65 exception to the absentee eligibility criteria.”<sup>600</sup> In May 2020, in Texas, CLC moved to intervene on behalf of the League of United Latin American Citizens (LULAC) in a lawsuit filed by the Texas Democratic Party challenging Texas’s vote-by-mail eligibility restrictions—the case remains pending in federal court.<sup>601</sup>

Some states have also erected unduly burdensome requirements for casting absentee ballots that make the option illusory for many voters. For example, Alabama requires voters to send an application for an absentee ballot for every election to a special absentee election manager for the county, including a photocopy of their voter ID, and then return the ballot with a notary signature or the signature of two witnesses.<sup>602</sup> In Mississippi, the application to vote by mail-in ballot must be notarized.<sup>603</sup>

In another example, Ms. Lang testified that “[f]rom start to finish, Tennessee makes vote by mail unduly difficult and inaccessible.”<sup>604</sup> CLC has several lawsuits pending in Tennessee, two of them, Ms. Lang notes, particularly relevant to minority voters’ opportunities to vote. CLC is challenging Tennessee’s strict limitations on who can vote by mail and the state’s failure to allow voters to fix issues with their absentee ballots after they are rejected due to a perceived signature mismatch.<sup>605</sup>

Additionally, Tennessee law does not allow most first-time voters to vote by mail even if they otherwise qualify under the state’s strict eligibility criteria.<sup>606</sup> Ms. Lang testified that, “[t]hus, new voters—who are disproportionately young and of color—are locked out of absentee voting even when they have no way to present themselves to vote in person.”<sup>607</sup> Allison Riggs of the Southern Coalition for Social Justice testified that “[t]he five states that did not allow unfettered access to vote-by-mail in 2020—Tennessee, Texas, Mississippi, Indiana, and Louisiana—were in the bottom 10 in turnout countrywide.”<sup>608</sup>

Additionally, when a voter does vote by mail-in ballot, often there is no guarantee the ballot will be counted, as election officials often have the discretion to reject a ballot if they perceive

<sup>599</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Danielle Lang at 28-30.

Texas law restricts access to absentee ballots to voters who meet one of a handful of specific eligibility criteria: voters who (1) will be away from their county on Election Day and during the entire early voting period; (2) are sick or disabled; (3) are 65 years of age or older on Election Day; or (4) are confined in jail, but eligible to vote.

<sup>600</sup> *Id.*

<sup>601</sup> *Id.*

<sup>602</sup> *Id.*

<sup>603</sup> *Id.*

<sup>604</sup> *Id.* at 32.

<sup>605</sup> *Id.*

<sup>606</sup> *Id.*

<sup>607</sup> *Id.*

<sup>608</sup> *Voting in America: Ensuring Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), testimony of Allison Riggs, hearing transcript at 19.

discrepancies in the voter’s signature.<sup>609</sup> Ms. Lang testified that “signature matching” has been shown to “disproportionately discount the ballots of voters with disabilities, older voters, and voters who are non-native English speakers or racial minorities.”<sup>610</sup> Ms. Diaz of the UCLA Latino Policy and Politics Initiative also testified that, “signature matching requirements for mail ballots create a potential to disenfranchise Latino voters” and “[u]ltimately, mandatory signature matching is likely to have a disproportionate effect on the young, elderly, disabled, racial/ethnic minorities, and limited English proficient voters.”<sup>611</sup>

If not implemented in conjunction with in-person voting options and in consultation with tribal governments, mail-in voting can replicate many of the same barriers and distance issues faced by Native voters.<sup>612</sup> A lack of traditional addresses, inconsistent access to postal services, and distance all create barriers to fully accessing mail-in voting for many Native American voters.

The use of drop boxes or allowing a third-party to return a voter’s mail-in ballot have also been the target of restrictions in recent years. Ms. Lang testified that last year, approximately 41 percent of voters who voted absentee used ballot drop boxes, just 3 percent less than the percentage of voters who returned their ballot using the Postal Service.<sup>613</sup> Yet, despite widespread, secure usage of drop boxes, states such as Texas moved to restrict the ability of voters to return their ballots via drop box—during the election the Governor of Texas issued an order restricting counties to one drop box per county and forcing counties that had deployed more than one to remove them.<sup>614</sup>

Ms. Lang testified that “[t]his eleventh-hour decision to limit access to safe ballot drop-off locations so close to the election sowed mass confusion. Moreover, it disproportionately affected Black and Latino voters living in major metro areas and voters who were entitled to vote by mail because they were older or had disabilities.”<sup>615</sup> The Governor’s order forced highly populous, majority-minority counties like Harris County, which has 4.7 million residents (more than 26 states) to cut their drop off locations from the 12 they had set up over roughly 1,700 square miles to one.<sup>616</sup> These restrictions harmed minority voters in both populous counties and rural counties like majority-minority Brewster County on the Texas-Mexico border.<sup>617</sup>

A lack of convenient access to drop boxes to return mail-in ballots was a consistent barrier for Native voters, as noted in NARF’s 2020 report.<sup>618</sup> All too often, drop boxes are located

<sup>609</sup> *Id.* at 33.

<sup>610</sup> *Id.*

<sup>611</sup> *Voting in America: Ensuring Free and Fair Access to the Ballot:* Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Sonja Diaz at 14-15.

<sup>612</sup> Tucker *et al.*, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, Native American Rights Fund (2020) at 93-97.

<sup>613</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot:* Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Danielle Lang at 35.

<sup>614</sup> *Id.*

<sup>615</sup> *Id.* at 35-36.

<sup>616</sup> *Id.*

<sup>617</sup> *Id.* at 36 (“At 6,184 square miles, Brewster County is larger in area than the states of Rhode Island and Delaware combined. Yet Gov. Abbott’s order also restricted Brewster County to just one ballot drop off location.”).

<sup>618</sup> Tucker *et al.*, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, Native American Rights Fund (2020) at 97-98.

off tribal lands, in some cases great distances from Native American communities.<sup>619</sup> Bans on ballot return also disproportionately harm Native American voters. Many Native Americans rely on P.O. boxes that are often far from their homes. As detailed by NARF, families commonly “pool” their mail, meaning “one person who is going to town would collect it for everyone else to drop off at the post office.”<sup>620</sup>

Also, some people who cannot afford a P.O. box will have their mail sent to someone else who does have one, meaning if the mail contains an early ballot, depending on the law, that neighbor could be implicated in a banned ballot collection practice.<sup>621</sup> NARF, along with the ACLU and the ACLU of Montana is currently challenging two new Montana laws that hinder Native American participation in voting, including one that attempts to block organized ballot collection on rural reservations.<sup>622</sup> In September 2020, a Montana court permanently struck down a different state law, the so-called Montana Ballot Interference Prevention Act (BIPA), which imposed severe restrictions on ballot collection efforts critical to Native Americans living on rural reservations.<sup>623</sup> In its order, the court held that the costs borne by Native American communities associated with BIPA were “simply too high and too burdensome to remain the law of the State of Montana.”<sup>624</sup>

## Recent Attacks on Opportunities to Vote

Despite the record-setting voter turnout experienced in 2020 and the secure nature in which the election was conducted, attacks on opportunities to vote are well underway in many states. According to the Brennan Center for Justice, at least 16 mail voting restrictions in 12 states will make it more difficult to cast mail ballots that are counted and at least 8 states have enacted 11 laws that make in-person voting more difficult.<sup>625</sup> According to the Brennan Center’s state law roundup:

Three states have limited the availability of polling places: Montana permitted more locations to qualify for reduced polling place hours; Iowa reduced its Election Day hours, shortened the early voting period, and limited election officials’ discretion to offer additional early voting locations; and Georgia reduced early voting in many counties by standardizing early voting days and hours.<sup>626</sup>

In Florida, Governor Ron DeSantis signed into law a bill that makes it more difficult to vote by mail-in ballot and makes it harder for voters to access secure drop boxes.<sup>627</sup> On May 6, 2021,

<sup>619</sup> *Id.* at 98.

<sup>620</sup> *Id.* at 113.

<sup>621</sup> *Id.*

<sup>622</sup> *New Montana Laws Restrict Native Voter Participation*, Native American Rights Fund (May 17, 2021), <https://www.narf.org/2021-montana-voter-laws/>.

<sup>623</sup> *Court Permanently Strikes Down Montana Law That Restricts Native Voting Rights*, Native American Rights Fund (Sept. 25, 2020), <https://www.narf.org/montana-bipa/>.

<sup>624</sup> *Id.*, see also *Western Native Voice et al. v. Stapleton et al.*, Cause No. DV 20-0377 (MT 13<sup>th</sup> Judicial Dist. Ct., Cty. of Yellowstone), [https://narf.org/nill/documents/20200925mt-ballot-order.pdf?\\_ga=2.171019432.940821445.1625191755-2111959495.1625191755](https://narf.org/nill/documents/20200925mt-ballot-order.pdf?_ga=2.171019432.940821445.1625191755-2111959495.1625191755).

<sup>625</sup> *Voting Laws Roundup: May 2021*, BRENNAN CENTER FOR JUSTICE, (May 28, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2021>.

<sup>626</sup> *Id.*

<sup>627</sup> Eliza Sweren-Becker, *Florida Enacts Sweeping Voter Suppression Law*, BRENNAN CENTER FOR JUSTICE (Apr. 30, 2021, updated May 6, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/florida-enacts-sweeping-voter-suppression-law>.

the NAACP LDF filed a lawsuit on behalf of the Florida State Conference of the NAACP, Disability Rights Florida, and Common Cause, challenging many of the provisions in SB 90 (2021), including new ID requirements for requesting mail-in ballots, new requirements for standing mail-in applications, limitations on the use of drop boxes, and others—this litigation is pending.<sup>628</sup>

As noted earlier in this section, Republicans in the Texas state legislature are pushing a bill that would put limitations on early voting hours (including Sunday early voting), increase restrictions on vote-by-mail, and curb voting options such as drive-thru voting.<sup>629</sup> This proposed law comes after an election cycle in which, despite the ongoing pandemic, the Governor limited the number of drop-off locations for mail-in ballots to one site per county via proclamation, forcing Harris County, for example, to cut their drop-off locations from 12 to 1.<sup>630</sup> Republicans attempted to preemptively throw out more than 125,000 early voting ballots from drive-thru polling sites in Harris County (the state’s most populous county) via court challenge;<sup>631</sup> and refused to expand eligibility for no-excuse absentee voting.

According to the *Texas Tribune*, Senate Bill (SB) 7 takes aim at opportunities to vote used by minority voters, “[p]ortions of the bill were specifically written to target voting initiatives Harris County used in the last election—such as a day of 24-hour early voting, drive-thru voting, and an effort to proactively distribute applications to vote by mail—that were heavily used by voters of color. But under SB 7, those options will be banned across the state.”<sup>632</sup> Ms. Longoria testified that SB 7 would have prohibited the Elections Administrator from opening the polls before 6:00 a.m. or after 9:00 p.m. on weekdays or Saturday—a prohibition that would “disproportionately hurt voters of color, particularly those who are Black and Hispanic.”<sup>633</sup>

Despite failing to pass SB 7 in the regular legislative session, the Texas Legislature began a special session on July 8, 2021, in which both the House and Senate revived separate proposals (Senate Bill 1 and House Bill 3) that would enact restrictions on opportunities to vote such as outlawing the drive-thru voting option utilized by Harris County, regulating early voting hours to preempt expanded early voting opportunities such as 24-hour voting, and prohibiting local election officials from sending unsolicited mail-in ballot applications, among others.<sup>634</sup>

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<sup>628</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong.* (2021), written testimony of Janai S. Nelson at 18.

<sup>629</sup> Alexa Ura, *Texas Democrats abandon House floor, blocking passage of voting bill before final deadline*, TEX. TRIBUNE (May 30, 2021), <https://www.texastribune.org/2021/05/30/texas-voting-restrictions-house/>.

<sup>630</sup> Ashley Killough, Ed Lavandera, & Paul LeBlanc, *Texas governor limits election drop boxes to one per county in sprawling state*, CNN (Oct. 5, 2020), <https://www.cnn.com/2020/10/01/politics/texas-governor-drop-off-locations-ballots/index.html>.

<sup>631</sup> Jolie McCullough, *Texas Supreme Court rejects Republican-led effort to throw out nearly 127,000 Harris County votes*, TEX. TRIBUNE (Nov. 1, 2020), <https://www.texastribune.org/2020/11/01/texas-drive-thru-votes-harris-county/>.

<sup>632</sup> Alexa Ura, *Texas Democrats abandon House floor, blocking passage of voting bill before final deadline*, TEX. TRIBUNE (May 30, 2021), <https://www.texastribune.org/2021/05/30/texas-voting-restrictions-house/>.

<sup>633</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong.* (2021), written testimony of Isabel Longoria at 3.

<sup>634</sup> Alex Ura, *What's in the new voting restriction legislation introduced in the Texas House and Senate*, TEX. TRIBUNE (July 8, 2021), <https://www.texastribune.org/2021/07/08/texas-voting-bill-special-session/>.

Ms. Riggs testified that, once again, under the guise of “election integrity,” the North Carolina legislature is responding to the 2020 election by introducing bills that would restrict access to voting options.<sup>635</sup> Ms. Riggs testified that one troubling bill moving through the legislature is Senate Bill (SB) 326, which would “[w]ith no justification” require voters to submit an absentee ballot request form earlier than was required in 2020, and would require all civilian absentee ballots to be received no later than 5:00 p.m. on Election Day to be counted—currently ballots postmarked by Election Day and received no later than three days after Election Day are counted.<sup>636</sup> In analyzing data from the 2020 election, Ms. Riggs testified that, “SCSJ internal data show that in the first few days after Election Day in 2020, Black voters’ ballots represented a significant percentage of those ballots received when compared to White voters’ ballots (where race was designated)” and “[t]o be clear, all these voters who relied on the United States Postal Service would be disenfranchised under the new law. But the harm to Black voters, whose participation rate has dropped below the rate seen in 2008 and 2012, is very troubling.”<sup>637</sup>

In March 2021, on the heels of record voter turnout in the November 2020 general election and January 2021 run-off election, the State of Georgia also enacted a suppressive voting law that makes cuts to voting opportunities, which will disproportionately impact minority voters.

Ms. Nelson of LDF testified that LDF, along with several partners, filed suit in the U.S. District Court for the Northern District of Georgia challenging Georgia’s SB 202 for intentional racial discrimination and discriminatory results under Section 2 of the VRA, intentional racial discrimination under the Fourteenth and Fifteenth Amendments, as an unconstitutional burden on the right to vote under the First and Fourteenth Amendments, and as an unconstitutional burden on the right to freedom of speech and expression under the First Amendment.<sup>638</sup>

The Justice Department has also filed suit against the State of Georgia, the Georgia Secretary of State, and the Georgia State Elections Board over the newly enacted law, challenging provisions of the law under Section 2 of the VRA.<sup>639</sup> The Justice Department’s complaint argues that several provisions of SB 202 were “adopted with the purpose of denying or abridging the right to vote on account of race.”<sup>640</sup> The suit further alleges that “the cumulative and discriminatory effect of these laws—particularly on Black voters—was known to lawmakers and that lawmakers adopted the law despite this.”<sup>641</sup>

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<sup>635</sup> *Voting in America: Ensuring Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Allison Riggs at 5-8; see also Denise Lieberman, *North Carolina Moves Legislation to Make Voting by Mail Harder*, BRENNAN CENTER FOR JUSTICE (June 10, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/north-carolina-moves-legislation-make-voting-mail-harder>.

<sup>636</sup> *Id.* at 6.

<sup>637</sup> *Id.* at 6-7.

<sup>638</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Janai S. Nelson at 19.

<sup>639</sup> Office of Public Affairs, *Justice Department Files Lawsuit Against the State of Georgia to Stop Racially Discriminatory Provision of New Voting Law*, U.S. DEP’T OF JUSTICE (June 25, 2021), <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-against-state-georgia-stop-racially-discriminatory>.

<sup>640</sup> *Id.*

<sup>641</sup> *Id.*

## CONCLUSION

Americans no longer vote solely on a single Tuesday. For millions of Americans, Election Day-only voting is impractical or inaccessible. Increasing access to opportunities to vote benefits all voters and increases participation in our democratic process—but targeted restrictions on these opportunities disproportionately and discriminatorily burden minority voters. As Ms. Lang testified, “[t]he early in-person voting options are wildly uneven nationwide. While some Americans enjoy a broad range of voting opportunities, others face increasing constraints on their voting options.”<sup>642</sup>

Cuts to early in-person voting, especially Sunday voting, and a lack of adequate early voting sites serves to disenfranchise minority voters and, in some cases, has been shown to be enacted with discriminatory intent. Additionally, mail-in voting is a safe, secure, and critical option for many voters, but if enacted with unreasonable and discriminatory barriers, can remain out of reach for many minority voters. Finally, attacks on alternative opportunities for returning a ballot have a discriminatory impact of many minority voters.

The evidence before the Subcommittee is clear—cuts to early voting, limiting the availability of early voting options, undue restrictions on mail-in ballots, and unfounded restrictions on ballot return options erect discriminatory barriers to voting.

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<sup>642</sup> *Voting in America: The Potential for Polling Place Quality and Restrictions on Opportunities to Vote to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), testimony of Danielle Lang, hearing transcript at 67.

# CHAPTER EIGHT

## *Changes to Methods of Election, Jurisdictional Boundaries, and Redistricting*

### BACKGROUND

Discriminatory practices in, and changes to, methods of election, jurisdictional boundaries, and redistricting impact whether voters can elect representatives that reflect their voices and communities. Discriminatory redistricting, vote dilution, annexations, deannexations, drawing of jurisdictional boundaries, and changes to the method of election all affect elections and representation ranging from local-level school boards to state courts and Congressional seats.

*Shelby County v. Holder* itself began as a change to jurisdictional boundaries and the method of election for a local city council seat. There, the city attempted to change the district lines for the Calera City Council in Calera, Shelby County, Alabama. In redrawing the district lines, the voting population for Voting District 2 changed dramatically, bringing in hundreds of White voters, cutting the proportion of Black voters from more than two-thirds to one-third.<sup>643</sup>

At the time, Alabama was subject to statewide preclearance under Section 5 of the VRA and the new district map was subject to review and approval by the Justice Department. The DOJ was not persuaded that the new map would not discriminate against Black voters and voided the new map.<sup>644</sup> The day after the DOJ struck down the map, Calera held a previously scheduled city council election under the now-voided map in which Ernest Montgomery, the District 2 representative and the only African American on the five-member city council, was voted out of office.<sup>645</sup> The DOJ blocked certification of the election results pending a new vote.

After a year of negotiation, Calera got rid of its district map, moving instead to a six-seat “at-large” council and in a new election, Ernest Montgomery won one of the seats.<sup>646</sup> These circumstances served as the predicate for lawyers to bring suit challenging the constitutionality of the coverage formula and preclearance regime of the VRA.

The Voting Rights Act of 1965 prohibits not only discrimination in the denial of access to the ballot, but also in dilution of voters, such as the way district lines are drawn to dilute the ability of voters of color to elect their preferred candidate. Voting changes that were once covered by Section 5 included, among others:

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<sup>643</sup> Joan Biskupic, *Insight: From Alabama, an epic challenge to voting rights*, REUTERS (June 4, 2012), <https://www.reuters.com/article/us-usa-court-votingsrights/insight-from-alabama-an-epic-challenge-to-voting-rights-idUSBRE85304M20120604>.

<sup>644</sup> *Id.*

<sup>645</sup> *Id.*

<sup>646</sup> *Id.*

(d) Any change in the boundaries of voting precincts or in the location of polling places. (e) Any change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, annexation, deannexation, incorporation, dissolution, merger, reapportionment, changing to at-large elections from district elections, or changing to district elections from at-large elections). (f) Any change in the method of determining the outcome of an election (e.g., by requiring a majority vote for election or the use of a designated post or place system).<sup>647</sup>

Additionally, the redistricting process can and has been used to deny political power and equal representation to minority populations. As discussed below, without proactive protections against discriminatory redistricting, it can take years to litigate a redistricting case. While a case winds its way through the courts, numerous elections can take place under a map that is later found to be discriminatory and invalid.

States are entering the first federal decennial redistricting cycle without the full protections of the Voting Rights Act since its enactment in 1965. Without proactive protections to ensure district lines are not drawn in a discriminatory manner, voters could be forced to go to the polls under maps that years later, through lengthy and costly litigation, are found to be discriminatory and invalid.

The evidence presented to the Subcommittee demonstrates conclusively that changes to methods of election, alterations to jurisdictional boundaries, and redistricting can and do disproportionately and discriminatorily impact minority voters and can be, in some cases, wielded with discriminatory intent.

## THE DISPROPORTIONATE AND DISCRIMINATORY BURDEN AND IMPACT ON MINORITY VOTERS OF CHANGES TO METHODS OF ELECTION, JURISDICTIONAL BOUNDARIES, AND REDISTRICTING

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*“For as long as we have been redrawing electoral district lines after decennial censuses, redistricting has been a tool used to dilute and silence the voices of voters of color.”*

— Allison Riggs, Co-Executive Director,  
Southern Coalition for Social Justice

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There is a long, documented history of methods of election, altering jurisdiction boundaries, and redistricting processes being used to discriminate against, dilute the voting power of, and effectively disenfranchise minority voters. Since Reconstruction and the rise of Jim Crow, as Black, Latino, Indigenous, and Asian American communities gained access to the franchise, overcame barriers to voting, and gained political power

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<sup>647</sup> U.S. Comm'n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at 247; citation 1373: According to federal regulation 28 C.F.R. § 51.13, Example of Changes [52 FR 490, Jan. 6, 1987, as amended by Order 3262-2011, 76 FR 21244, Apr. 15, 2011].

and voting strength, they have been met with suppressive tactics meant to dilute their votes and ensure voting power for the shrinking majority.

A November 2019 report on discriminatory voting practices produced by AAJC, MALDEF, and NALEO noted that, for example, since 1957, “there have been at least 1,753 legal and advocacy actions that successfully overturned a discriminatory change in method of election because of its discriminatory intent or effects.”<sup>648</sup> The report also cites that at least 219 annexations or deannexations have been challenged and invalidated by a court or the DOJ, or amended or withdrawn.<sup>649</sup> Additionally, according to the report, since 1957, 982 redistricting plans were challenged and invalidated by a court or the DOJ or amended or withdrawn because of their discriminatory intent or effects.<sup>650</sup>

Professor Patty Ferguson-Bohnee testified that, before *Shelby County*, the Department of Justice issued nine Section 5 objections to redistricting plans involving Native voters in Alaska, Arizona, and South Dakota—five of those were in Arizona.<sup>651</sup> Additionally, since 1966, 22 federal cases challenging at-large election systems, redistricting lines, or malapportionment have been filed on behalf of Native voters, including state legislative districts, school boards, counties, sanitation districts, and city councils.<sup>652</sup> Of these 22 cases, 6 were brought by the Department of Justice.<sup>653</sup>

Thomas Saenz of MALDEF testified before the Subcommittee that Latino voters have also seen attempts to limit the growth of their voting power, including “the perpetuation or re-introduction of at-large voting or the failure to acknowledge and incorporate the growth of the Latino community in the decennial redistricting process.”<sup>654</sup> Asian Americans have also seen the district drawing process used in attempts to dilute their voting power.<sup>655</sup>

Black voters have long-experienced attacks on their voting power through vote dilution, annexations, redrawing jurisdictional boundaries, and discriminatory redistricting maps. As Justice Kagan noted in her *Brnovich* dissent, following the passage of the VRA:

The crudest attempts to block voting access, like literacy tests and poll taxes, disappeared. Legislatures often replaced those vote denial schemes with new measures—mostly to do with districting—designed to dilute the impact of minority votes. But the Voting Rights Act, operating for decades at full strength, stopped many of those measures too.<sup>656</sup>

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<sup>648</sup> Hustings, Minnis, & Senteno, *Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities' Votes*, NALEO, AAJC & MALDEF (Nov. 2019).

<sup>649</sup> *Id.*

<sup>650</sup> *Id.*

<sup>651</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), testimony of Patty Ferguson-Bohnee, hearing transcript at 22.

<sup>652</sup> *Id.*

<sup>653</sup> *Id.* at 4.

<sup>654</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Thomas A. Saenz at 3.

<sup>655</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Jerry Vattamala at 8.

<sup>656</sup> *Brnovich v. DNC*, 594 U.S. \_\_\_\_ (2021), dissent.

In the immediate aftermath of *Shelby County*, states and localities redistricted, drawing new lines, or changing the method of election from neighborhood seats to at-large districts, in ways “guaranteed to reduce minority representation.”<sup>657</sup>

## Changes to Method of Election and Jurisdictional Boundaries

Altering methods of election and jurisdictional boundaries has long been used to discriminate against minority voters and dilute voting power. In definitional terms, “method of election” refers to “the system for electing members of a body and may include features affecting the size and composition of the electorate that votes for a given seat, the timing of election for certain seats, and the number or percentage of votes required to win an election.”<sup>658</sup>

At-large elections occur when representatives are elected from one large district simultaneously, rather than at the community level through local, single-member districts.<sup>659</sup> Janai Nelson of the NAACP Legal Defense Fund testified that “[a]t-large elections can allow 51 percent of voters to control 100 percent of the seats on an elected body, which, in the presence of racially polarized voting and other structures, can dilute a racial minority group’s voice in the electoral system.”<sup>660</sup> Multi-member elections occur when a jurisdiction is divided up into districts and, in each, voters all vote for each of the multiple seats.<sup>661</sup> Shifts to these two methods can be used to dilute the voting power of minority communities and prevent them from electing representatives of their choosing.

In addition to altering the method of election, tactics such as annexations, deannexations, or shifting jurisdictional boundaries dilute the political power of minority voters by selectively altering the racial and ethnic makeup of the electorate.<sup>662</sup>

In one of the first lawsuits challenging a change made after the VRA’s preclearance protections were undermined in *Shelby* involved a change to the method of election for the Pasadena, Texas City Council. MALDEF challenged the conversion of the Pasadena, Texas City Council from eight districted seats to six districted seats and two at-large seats.<sup>663</sup> Mr. Saenz of MALDEF testified that this change was “plainly undertaken to prevent the growing Latino voting population from electing a majority of the city council; participation differentials virtually ensured that the white population would elect its choices for the at-large seats in elections characterized by a racially polarized vote.”<sup>664</sup>

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<sup>657</sup> *Id.* (citing Elmendorf & Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2416 (2015)).

<sup>658</sup> Hustings, Minnis & Senteno, *Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities’ Votes*, NALEO, AAJC & MALDEF (Nov. 2019).

<sup>659</sup> *Id.* at 16.

<sup>660</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Congress (2021), written testimony of Janai S. Nelson at 16.

<sup>661</sup> Hustings, Minnis & Senteno, *Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities’ Votes*, NALEO, AAJC, & MALDEF (Nov. 2019) at 16.

<sup>662</sup> *Id.*

<sup>663</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Congress (2021), written testimony of Thomas A. Saenz at 4.

<sup>664</sup> *Id.*

Following a bench trial, the district court judge held that not only would the change have the effect of unlawfully diluting the Latino vote, but it was made intentionally to do so.<sup>665</sup> Chief Judge Rosenthal of the U.S. District Court for the Southern District of Texas stated, “[t]he intent was to delay the day when Latinos would make up enough of Pasadena’s voters to have an equal opportunity to elect Latino-preferred candidates to a majority of City Council seats.”<sup>666</sup> Mr. Saenz testified that, following a long and costly trial preparation and trial process, this resulted in the first contested “bail-in” order, requiring Pasadena to pre-clear future electoral changes.<sup>667</sup>

Sonja Diaz of the UCLA Latino Policy and Politics Initiative noted that, in California, because of the 1990 federal court decision in *Garza v. Los Angeles County Board of Supervisors*, Los Angeles County was forced to create the first Latino-majority seat<sup>668</sup>—30 years later, the Board of Supervisors still has only one Latino-majority district, despite the Latino citizen population increasing 77 percent over the last 20 years.<sup>669</sup>

Mr. Saenz testified that, 10 years ago, MALDEF identified 8 counties in California that should have drawn an additional Latino-majority district on their 5-member county board of supervisors but failed to do so.<sup>670</sup> Mr. Saenz testified that, “[e]ven with unlimited resources, challenging eight jurisdictions through litigation under section 2 of the VRA . . . would be daunting, if not impossible.”<sup>671</sup> While MALDEF successfully challenged Kern County in “the first section 2 litigation to go to trial in California in well over a decade, seven other counties were able to leave their VRA-violative district maps in place throughout the decade.”<sup>672</sup>

Examples of changes to methods of election, and related tactics can be found around the country. In 2014, a federal court ordered Yakima, Washington, to create new, single-member City Council districts to remedy an at-large districting scheme that routinely suffocated the vote of Latino voters.<sup>673</sup> Ms. Diaz testified that, in the first election with the new districts, three Latinas were elected to the City Council, though this was met with forms of retaliation.<sup>674</sup> In response, “the city clerk, along with some ousted white city council members, resigned an entire month early” and White council members “sought to leverage an at-large ballot referendum to reduce the electoral voice of Latinos by creating a strong mayor system.”<sup>675</sup> Ms. Diaz testified that:

<sup>665</sup> *Id.*

<sup>666</sup> Hustings, Minnis & Senteno, *Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities’ Votes*, NALEO, AAJC & MALDEF (Nov. 2019) at 21, citing *Patino v. Pasadena*, 230 F. Supp.3d 667, 725 (S.D. Tex. 2017).

<sup>667</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Congress (2021), written testimony of Thomas A. Saenz at 4.

<sup>668</sup> *Voting in America: Ensuring Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), testimony of Sonja Diaz, hearing transcript at 23, see also *Garza v. County of Los Angeles*, Cal. 756 F. Supp. 1298 (C.D. Cal. 1991).

<sup>669</sup> *Id.*

<sup>670</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Congress (2021), written testimony of Thomas A. Saenz at 5.

<sup>671</sup> *Id.*

<sup>672</sup> *Id.*

<sup>673</sup> *Voting in America: Ensuring Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), testimony of Sonja Diaz, hearing transcript at 23-24.

<sup>674</sup> *Id.* at 24.

<sup>675</sup> *Id.*

In response, the non-Hispanic white members of the Yakima city council attempted a retaliatory change to the charter as a way to reduce the power of the city council to ensure that Latinos could not have a majority of the representation on the seven person council, in violation of Section 2 of the Voting Rights Act. [Voting Rights Project] successfully intervened on behalf of Latino plaintiffs to stop the proposed districting change to a mayor-council system, which if adopted, would revert the single-district council to an at-large election that dilutes the Latino vote.<sup>676</sup>

Ms. Nelson of the NAACP LDF testified that, in 2015, the County Commission in Fayette County, Georgia tried to revert to an at-large voting system in a special election to replace a Black Commissioner who had died unexpectedly.<sup>677</sup> LDF won a Section 2 case that stopped this change and required the election to use single-member districts, which allow Black voters to again elect their preferred candidate.<sup>678</sup>

In another example, in 2016, the largely white City of Gardendale, Alabama attempted to secede from the more diverse Jefferson County School Board, a move that would have effectively transferred Black voters in Gardendale from a system in which they had some ability to elect candidates of their choice, to the Gardendale city council's at-large election system in which Black voters have no ability to elect candidates of their choice.<sup>679</sup> Ms. Nelson testified that, in 2018, the Eleventh Circuit Court blocked the secession after LDF successfully proved that Gardendale was motivated by racial discrimination.<sup>680</sup> Since *Shelby County*, LDF has warned at least four local jurisdictions in Alabama that “the at-large aspects of their electoral systems may violate Section 2 of the VRA and potentially also the U.S. Constitution.”<sup>681</sup>

Ms. Nelson also testified that, in 2017, LDF “proved that the Louisiana Legislature intentionally maintained at-large elections for the state courts in Terrebonne Parish to prevent the election of a Black judge.”<sup>682</sup> A Black candidate has *never* been elected as a judge on the court in a contested election.<sup>683,684</sup> A three-judge panel of the Fifth Circuit reversed the favorable decision in June 2020, despite the trial court’s finding that plaintiffs clearly established vote dilution and denied LDF’s petition for rehearing *en banc*.<sup>685</sup>

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<sup>676</sup> *Id.*, written testimony of Sonja Diaz at 23.

<sup>677</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Janai S. Nelson at 18.

<sup>678</sup> *Id.* (citing *Ga. State Conf. of the NAACP v. Fayette Cty. Bd. of Comm’rs*, 118 F.Supp.3d 1338 (ND Ga. 2015)).

<sup>679</sup> *Id.* at 15-16.

<sup>680</sup> *Id.* (citing *see, e.g., Lee v. Chambers County Bd. of Educ.*, 849 F. Supp. 1474, 1479 (M.D. Ala.) (1994); *Robinson v. Alabama State Dept. of Educ.*, 652 F. Supp. 484, 485-86 (M.D. Ala.) (1987) (three judge court)).

<sup>681</sup> *Id.*

<sup>682</sup> *Id.* at 20, (citing *Terrebonne Par. Branch NAACP v. Jindal*, 274 F. Supp.3d 395, 462 (MD La. 2017)).

<sup>683</sup> *Id.*

<sup>684</sup> *Case: Terrebonne Parish Branch NAACP, et al. v. Jindal, et al.*, NAACP Legal Defense and Educational Fund, Inc. (date filed: Feb. 16, 2018), <https://www.naacpldf.org/case-issue/terrebonne-parish-branch-naACP-et-al-v-jindal-et-al/> (“Although Black residents comprise 20 percent of Terrebonne Parish’s population, are geographically concentrated within the Parish, and consistently vote together to attempt to elect candidates of their choice, no Black candidate has ever been elected in the face of opposition to the 32nd Judicial District Court under the at-large system of election.”).

<sup>685</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Janai S. Nelson at 20.

Professor Patty Ferguson-Bohnee testified that at-large districts have also been used to deny Native American voters the opportunity to elect candidates of their choice—states such as Montana, North Dakota, South Dakota, and Wyoming have used this scheme over the last 25 years to deny voting power to Native voters.<sup>686</sup>

In Utah, for example, the Justice Department sued San Juan County in the 1980s arguing that the at-large system violated Section 2 of the VRA—the resulting consent decree resulted in single-member districts.<sup>687</sup> Despite population changes, the district lines did not change over the next 25 years and, despite changes that were made to the other two districts in 2011, the boundaries of the Native American-majority district remained the same.<sup>688</sup> The Navajo Nation challenged the scheme of packing Navajo voters into one, single district out of three. As a result of multi-year litigation, the county’s districts were reconfigured, and Native Americans were able to elect two candidates of choice—litigation that took seven years and cost plaintiffs \$3.4 million.<sup>689</sup>

There are additional examples of the Justice Department filing suit under Section 2 challenging methods of election schemes in the years post-*Shelby*. In 2017, the Justice Department filed a complaint under Section 2 challenging the City of Eastpoint, Michigan’s, at-large method of electing the city council as diluting the voting strength of Black citizens; and in June 2019, the court entered the parties’ consent decree providing for the city to use ranked choice voting to resolve the claims.<sup>690</sup> On May 27, 2020, the Department filed a complaint challenging the at-large method of election for the school board of the Chamberlain School District under Section 2 of the VRA in South Dakota alleging that the Native American population of the School District is sufficiently large and geographically compact to constitute a majority of the voting-age population and that the at-large method of election the Chamberlain School Board dilutes the voting strength of American Indian citizens.<sup>691</sup>

As recently as April 14, 2021, the DOJ filed a complaint and proposed consent decree under Section 2 of the VRA, challenging the at-large method of electing the board of alderman of the City of West Monroe, Louisiana’s, city council, arguing that the current method of electing the West Monroe Board of Aldermen dilutes the voting strength of Black citizens, who constitute 28.9 percent of the voting-age population of the City of West Monroe, but no Black candidate

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<sup>686</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong.* (2021), written testimony of Patty Ferguson-Bohnee at 5-6.

<sup>687</sup> *Id.* at 7.

<sup>688</sup> *Id.*

<sup>689</sup> *Id.* (citing *Navajo Nation v. San Juan County*, 162 F.Supp.3d 1162, 1166 (D. Utah 2016), *aff’d* 929 F.3d 1270 (10<sup>th</sup> Cir. 2019)).

<sup>690</sup> Civil Rights Division, *Cases Raising Claims Under Section 2 of the Voting Rights Act*, U.S. DEP’T. OF JUSTICE (Updated June 14, 2021), <https://www.justice.gov/crt/cases-raising-claims-under-section-2-voting-rights-act-0>. (Consent Decree, *United States v. City of Eastpointe* (No. 4:17-CV-10079, E.D. Mich., June 26, 2019), <https://www.justice.gov/crt/case-document/file/1279171/download>; see also Supp. Ord. *United States v. City of Eastpointe* (No. 4:17-CV-10079, E.D. Mich., Oct. 10, 2019), available at <https://www.justice.gov/crt/case-document/file/1280141/download>; Supp. Ord.. *United States v. City of Eastpointe* (No. 4:17-CV-10079, E.D. Mich., Aug. 26, 2020), available at <https://www.justice.gov/crt/case-document/file/1315316/download>).

<sup>691</sup> *Id.* (Consent Decree, *United States v. Chamberlain School District* (No. 4:20-cv-4084, D.S.D., June 18, 2020), available at <https://www.justice.gov/crt/case-document/file/1315656/download>).

has ever been elected to the West Monroe Board of Aldermen, and no Black individual has ever been appointed to the Board.<sup>692</sup>

This is merely a sampling of discriminatory actions executed through changes to methods of election and changes to jurisdictional boundaries. The evidence before the Subcommittee clearly illustrates that these practices are enacted with discriminatory effect and intent, resulting in the dilution of the voting power of minority voters and a severe restriction of their ability to elect candidates of their choosing.

## Redistricting

Each decade, following the decennial census and distribution of population data, states undertake to redraw or update district lines—this affects districts up and down the ballot and at all levels of government.<sup>693</sup> Discriminatory redistricting practices have been utilized for decades to dilute and suppress the voting power of minority voters and can impact representation at all levels of government. To put a finer point on it—in 1991, since-deceased Republican consultant Thomas Hofeller said, “I define redistricting as the only legalized form of vote-stealing left in the United States today.”<sup>694</sup>

In redistricting, officials can also use tactics known as “cracking” and “packing” to dilute the votes of minority communities. “Cracking” occurs when officials divide voters into a number of different districts, such that the minority voters in the districts do not have a majority in any of them—the purpose of which is to maximize the number of wasted votes.<sup>695</sup> “Packing” occurs when voters are placed into one or only a few districts, so the remaining districts are easier for non-minority voters to control.<sup>696</sup>

The country is now about to begin the first redistricting cycle without the full protections of the Voting Rights Act in more than a half century. According to the USCCR’s 2018 report on minority voting rights access, “overall data shows that there have been over 3,000 changes submitted due to redistricting in every 10-year cycle since the 1965 VRA was enacted.”<sup>697</sup> Research performed by AAJC, MALDEF, and NALEO found that, since 1982, “at least 389 redistricting plans have been challenged by a court of the DOJ, or amended or withdrawn by responsible lawmakers, because of their discriminatory intent or effects.”<sup>698</sup>

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<sup>692</sup> *Id.*, *United States v. West Monroe, LA* (W.D. La. 2021) (Consent Decree, *United States v. West Monroe, LA* (No. 3:21-cv-0988, W.D. La., Apr. 14, 2021), available at <https://www.justice.gov/crt/case-document/file/1401736/download>).

<sup>693</sup> Hustings, Minnis & Senteno, *Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities’ Votes*, NALEO, AAJC & MALDEF (Nov. 2019) at 23.

<sup>694</sup> Miles Parks, *Redistricting Guru’s Hard Drives Could Mean Legal, Political Woes For GOP*, NPR (June 6, 2019), <https://www.npr.org/2019/06/06/73026051/redistricting-gurus-hard-drives-could-mean-legal-political-woes-for-gop>.

<sup>695</sup> Tucker et al., *Obstacles at Every Turn: Barriers to Political Participation Faced By Native American Voters*, Native American Rights Fund (2020) at 115-116.

<sup>696</sup> *Id.* at 116-117 (“Packing often results from the use of malapportioned districts that violate equal population requirements to give non-Native voters disproportionate voting strength.”).

<sup>697</sup> U.S. Comm’n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at 249, citing U.S. Dep’t of Justice, *Voting Changes Enacted or Administered by Any State Official Require Section 5 Review*, <https://www.justice.gov/crt/what-must-be-submitted-under-section-5> (There were 3,846 redistricting changes submitted from 1965-89, 3,456 from 1990-99, and 3,141 from 2000-09.).

<sup>698</sup> Hustings, Minnis & Senteno, *Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities’ Votes*, NALEO, AAJC & MALDEF (Nov. 2019) at 28-29.

The redistricting process can and has been used to deny political power and equal representation to minority populations. While a district is supposed to follow the “one person, one vote” doctrine established by the Supreme Court in the 1960s, the drawing of districts is all too often done behind closed doors, without meaningful public input, and in a manner used to dilute the voices of some voters and, in effect, give disproportionate voting power to others.

Former Attorney General Eric H. Holder, Jr., Chairman of the National Democratic Redistricting Committee, testified before the Subcommittee that:

In the days since that ruling eight years ago, unnecessary and discriminatory voting restrictions went up across the country...And we saw newly emboldened state legislatures draw discriminatory maps that unfairly placed Black people and other people of color, young and poor people, into gerrymandered voting districts where their impact would be diluted and their voice ultimately lost.<sup>699</sup>

Jerry Vattamala of AALDEF testified that “Asian Americans have been historically disenfranchised in the redrawing of district boundaries and in their right to vote.”<sup>700</sup> Mr. Vattamala further testified that the percentage of Asian American elected officials is not keeping track with the population growth, in many instances because Asian American communities of interest are divided into numerous districts, “subverting the growth and thwarting the effects of this growth and the numbers, to deny them the ability to elect a candidate of their choice.”<sup>701</sup> Mr. Vattamala stated further that “we only see Asian American electoral representation when we have fair redistricting. Only then are they able to elect a candidate of choice and they usually do.”<sup>702</sup>

Professor Ferguson-Bohnee testified that “[i]n addition to well-documented access barriers, redistricting has been used as a tool to suppress Native American voting rights and depress Native American political power.”<sup>703</sup> In Arizona, for example, “Tribal voters challenged redistricting plans every cycle since the 1960s, except for the last decade following the 2010 Census.”<sup>704</sup> The last decade was the first time Arizona’s maps were precleared on the first attempt—now, the retrogression standard required under Section 5 of the VRA is no longer an option to protect the state’s single Native American majority-minority district in the upcoming redistricting cycle.<sup>705</sup>

Litigation alone can take years to remedy the harm of gerrymandering, meaning voters spend years represented by maps that are later found to have violated their rights. Cases challenging discriminatory maps drawn in the 2010 redistricting cycle in North Carolina and Texas, for

<sup>699</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong.* (2021), written testimony of Eric H. Holder, Jr. at 2.

<sup>700</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong.* (2021), written testimony of Jerry Vattamala at 8.

<sup>701</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong.* (2021), testimony of Jerry Vattamala, hearing transcript at 51.

<sup>702</sup> *Id.*

<sup>703</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong.* (2021), written testimony of Patty Ferguson-Bohnee at 3.

<sup>704</sup> *Id.* at 8.

<sup>705</sup> *Id.* at 9.

example, took more than half a decade to litigate, all while voters went to the polls under districting maps later found to be discriminatory and unlawful.

Allison Riggs of the Southern Coalition for Social Justice testified that, “[i]n the last decade, the North Carolina legislature’s repeated violations of the Fourteenth Amendment in redistricting, local and statewide, should give anyone pause, and are strong evidence of the need for federal protections.”<sup>706</sup>

Specifically, in North Carolina, the state drew redistricting maps that packed Black voters into as few districts as possible.<sup>707</sup> Plaintiffs filed a lawsuit, and the federal courts found that the challenged districts violated the Equal Protection Clause.<sup>708</sup> However, as Ms. Riggs testified, when the State General Assembly was given the first chance to remedy the districts, the legislature perpetuated the racial packing.<sup>709</sup> In 2016, after the District Court ruled against the state’s maps, state legislators drew new maps, this time admitting the purpose of the maps was partisan.<sup>710</sup>

In 2017, the Supreme Court upheld the lower court’s rejection of two North Carolina congressional maps on the grounds that North Carolina’s Republican-controlled legislature relied too heavily on race in drawing the maps.<sup>711</sup> The state’s maps had been the subject of continuous litigation since the 2011 redistricting—all the while, voters went to the polls to cast ballots under maps that were found, years later, to be unlawfully discriminatory. On October 28, 2019, a North Carolina state court again ruled against the state’s congressional district maps, saying the record of partisan intent was so extensive that opponents of the maps were poised to show that the maps were unconstitutionally gerrymandered to favor Republicans

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*“We have seen map manipulation and gerrymandering that has allowed politicians to pick their voters so that a party with minority views and minority support can illegitimately govern with majority power. In states that are politically competitive like Pennsylvania, North Carolina, and Wisconsin, one party has sought to draw lines with surgical precision, packing some voters together and splitting other towns and communities apart in order to create congressional delegations and legislatures that are heavily skewed on a partisan basis and immune to citizen accountability.”*

— Eric H. Holder, Jr., Former Attorney General of the United States, Chairman, National Democratic Redistricting Committee

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<sup>706</sup> *Voting in America: Ensuring Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Allison Riggs at 8.

<sup>707</sup> *Id.* at 9.

<sup>708</sup> *Id.* at 10.

<sup>709</sup> *Id.*

<sup>710</sup> Adam Liptak, *Partisan Gerrymandering Returns to a Transformed Supreme Court*, N.Y. TIMES (Mar. 18, 2019), <https://www.nytimes.com/2019/03/18/us/politics/gerrymandering-supreme-court.html>.

<sup>711</sup> *Cooper v. Harris*, 581 U.S. \_\_\_\_ (2017), see also Adam Liptak, *Justices Reject 2 Gerrymandered North Carolina Districts, Citing Racial Bias*, N.Y. TIMES (May 22, 2017), <https://www.nytimes.com/2017/05/22/us/politics/supreme-court-north-carolinacongressional-districts.html?module=inline>.

over Democrats and the voters would be irreparably harmed if the 2020 elections were held using those maps.<sup>712</sup>

But the North Carolina legislature is not the only bad actor. In 2019, Sean Young of the ACLU of Georgia testified before the Subcommittee that the ACLU’s case in Sumter County, Georgia “perfectly illustrates the damage that *Shelby County* has caused.”<sup>713</sup> In 2011, 67 percent of Sumter County’s Board of Education was African American (six out of nine)—then the General Assembly proposed a redistricting plan that would reduce the percentage of African Americans on the Board to 28 percent (two of seven) and submitted the plan to the DOJ for preclearance.<sup>714</sup> The DOJ did not preclear the plan, but following the *Shelby* decision the Board was able to immediately implement its discriminatory plan.<sup>715</sup> Soon thereafter, the ACLU of Georgia brought a lawsuit to overturn a discriminatory gerrymandering plan in Sumter County, Georgia—a federal court eventually ruled that the plan was discriminatory and violated the Voting Rights Act, *five* years after the plan went into effect and after years of expensive, time consuming litigation.<sup>716</sup> In the intervening five years, School Board elections were held under a plan that was discriminatory and illegal.<sup>717</sup>

In September 2013, the U.S. Department of Justice filed a complaint against the State of Texas as a plaintiff-intervenor in *Perez v. Perry* (W.D. Tex.), seeking a declaration that Texas’ 2011 statewide redistricting plans to the State House of Representatives and the Congressional delegation were adopted “with the purpose of denying or abridging the right to vote on account of race, color, or membership in a language minority group in violation of Section 2 of the Voting Rights Act”<sup>718</sup> and contended that the Texas state legislature’s plan diluted the voting power of Asian Americans and other people of color.<sup>719</sup>

Jerry Vattamala, Director of the Democracy Program at AALDEF, testified before the Subcommittee that, at the time of *Perez v. Perry*, Texas State House District 149 had a combined minority citizen voting-age population of close to 62 percent, and since 2004, the Asian American community in the District had voted as a bloc with Hispanic and African American voters to elect Hubert Vo, a Vietnamese American and the first Vietnamese American state representative in Texas history, as their representative.<sup>720</sup>

In 2011, the state legislature sought to eliminate Vo’s seat and redistribute the coalition of minority voters to the surrounding districts. In denying preclearance of the plan in 2012, the three-judge panel in Washington, D.C., found that the congressional and state redistricting

<sup>712</sup> Michael Wines, *State Court Bans Using North Carolina House Map in 2020 Elections*, N.Y. TIMES (Oct. 28, 2019), <https://www.nytimes.com/2019/10/28/us/north-carolina-gerrymander-maps.html?action=click&module=Top%20Stories&pgtype=Homepage>.

<sup>713</sup> *Voting Rights and Election Administration in Georgia*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), written testimony of Sean J. Young at 1-2.

<sup>714</sup> *Id.*

<sup>715</sup> *Id.*

<sup>716</sup> *Id.*

<sup>717</sup> *Id.*

<sup>718</sup> Civil Rights Division, *Cases Raising Claims Under Section 2 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE (Updated June 14, 2021), <https://www.justice.gov/crt/cases-raising-claims-under-section-2-voting-rights-act-0> (*United States v. State of Texas* (W.D. Tex. 2013)).

<sup>719</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Jerry Vattamala at 7.

<sup>720</sup> *Id.*

plan had “both a retrogressive effect and a racially discriminatory purpose.”<sup>721</sup> The decision later had to be vacated and remanded in light of the Supreme Court’s decision in *Shelby* and its implications for Section 5 preclearance claims.<sup>722</sup> That was not the end of litigation over Texas’ redistricting plans, however. The legal battle over Texas’ 2011 maps would go on for more than three-quarters of the decade and cost millions of dollars.<sup>723,724</sup> In the intervening years interim maps were put in place. Eventually, in *Abbot v. Perez*, the Supreme Court would allow all but one of Texas’ political districts to remain in place through the end of the decade.<sup>725</sup> The Court upheld the maps despite a district court describing the process used to create them as “discriminatory at its heart”<sup>726</sup>—while the Court did not specifically find discriminatory purpose in the adoption of the 2013 maps, “it did not dispute the determination that the 2011 maps were infected with the discriminatory intent to limit the influence of voters of color.”<sup>727</sup>

The State of Texas has a long history of racial discrimination in redistricting plans. In discussing Texas’ long history of discrimination in voting, in *Veasy v. Abbott*—litigation over Texas’ strict voter ID law—a federal court found in 2017 that “[i]n every redistricting cycle since 1970, Texas has been found to have violated the Voting Rights Act with racially gerrymandered districts.”<sup>728</sup> Despite being covered by the VRA since 1965, federal judges have ruled at least once every decade since then that Texas violated federal protections for voters in redistricting.<sup>729</sup>

In testimony before the Subcommittee, Thomas Saenz of MALDEF testified that:

Last decade, the state of Texas gained four congressional seats as a result of its comparatively rapid growth over the course of the aughts. Nearly two-thirds of that Texas population growth came in the Latino community. Still, in adopting a new congressional district map, the Texas legislature drew none of the four new districts within the Latino community, instead engaging in splitting the increased concentrations of Latino population among multiple districts in order to prevent Latino

<sup>721</sup> *Id.* at 7-8.

<sup>722</sup> *Id.*

<sup>723</sup> See Hustings, Minnis & Senteno, *Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities’ Votes*, NALEO, AAJC & MALDEF (Nov. 2019) at 29 (“In December 2018, redistricting litigation in North Carolina had already cost \$5.6 million in taxpayer dollars. The litigation related to Texas’s redistricting scheme was also a multi-million dollar affair, ultimately paid by taxpayers for the discrimination of government officials.”).

<sup>724</sup> See also *Oversight Hearing on Enforcement of the Voting Rights Act in Texas*: Hearing Before the Subcomm. on Const., Civil Rights, and Civil Liberties, 116<sup>th</sup> Cong. (2019), written testimony of Ernest I. Herrera at 5-6 (“Although Texas’s congressional and state house redistricting plans were initially blocked under Section 5 in 2012, the U.S. Supreme Court vacated that decision following *Shelby* and we were forced into litigation that is still ongoing today [2019]. After eight years of litigation, MALDEF has won revisions to the State’s 2011 maps, several findings of intentional racial discrimination, and the U.S. Supreme Court ruling in 2018 that Texas unconstitutionally racially gerrymandered Latinos in Fort Worth. However, Texas has yet to remedy this racial gerrymander, and the federal three-judge panel in San Antonio that has presided over the case continues to work on a remedy, including at a hearing yesterday.”)

<sup>725</sup> Alexa Ura, *How a decade of voting rights fights led to fewer redistricting safeguards for Texas voters of color*, TEX. TRIBUNE (Sept. 10, 2019), <https://www.texastribune.org/2019/09/10/texas-enters-2021-redistricting-fewer-safeguards-voters-color/>.

<sup>726</sup> *Id.*

<sup>727</sup> See Hustings, Minnis & Senteno, *Practice-Based Preclearance: Protecting Against Tactics Persistently Used to Silence Minority Communities’ Votes*, NALEO, AAJC & MALDEF (Nov. 2019) at 27.

<sup>728</sup> U.S. Comm’n on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States, 2018 Statutory Report* (Sept. 2018) at 77; see also *Veasy v. Abbott*, 71 F. Supp. 3d at 636 (2017).

<sup>729</sup> Alexa Ura, *How a decade of voting rights fights led to fewer redistricting safeguards for Texas voters of color*, TEX. TRIBUNE (Sept. 10, 2019), <https://www.texastribune.org/2019/09/10/texas-enters-2021-redistricting-fewer-safeguards-voters-color/>.

voters from electing candidates of choice. It took nearly a full decade of litigation under the VRA, waged by MALDEF and others, to ensure that an interim map, more respectful of the growing Latino community, would remain in place to protect Latino voters.<sup>730</sup>

In testimony submitted to the Subcommittee, Professor Ferguson-Bohnee detailed the long history of minimizing Native American political representation through redistricting in the State of Arizona.<sup>731</sup> The 2010 redistricting cycle was the first time Arizona’s maps were precleared on the first submission.<sup>732</sup> Tribes have previously participated in redistricting and defended the single majority-minority Native American legislative district—Arizona, like other states, is no longer subject to Section 5 preclearance for the coming redistricting cycle.<sup>733</sup>

In North Dakota, tribal leaders raised concerns before the Subcommittee at the 2019 field hearing that, though there is only one at-large Congressional representative, their reservations are divided in a way at state-level redistricting that no Native American can win a seat representing the tribal lands.<sup>734</sup> State Representative Ruth Buffalo testified in 2019 that, while she was the only Native American serving in the State House at the time of the hearing, she represents District 27—Fargo, North Dakota—a district 370 miles from her homelands of the Fort Berthold Reservation, and that the district representing Fort Berthold encompassed a white population that overwhelms the Native American population.<sup>735</sup>

In another example, Professor Ferguson-Bohnee testified that, in South Dakota, “discrimination in redistricting led to prolonged litigation followed by consent decrees.”<sup>736</sup> In 2004, in *Kirkie v. Buffalo County*, Buffalo County gerrymandered its three districts by packing 75 percent of the Indian population into one district.<sup>737</sup> As Professor Ferguson-Bohnee testified:

The county, the “poorest in the country,” was comprised of approximately 2,100 people, of which 83 percent were Indian. This redistricting had the purpose of diluting the Indian vote, as whites controlled both of the other two districts and thus County government. The case was settled by a consent decree wherein the county admitted its plan was discriminatory and was forced to redraw the district lines. In addition, the county agreed to subject itself to Section 3(c) of the Voting Rights Act, which requires the submission of voting changes for preclearance.<sup>738</sup>

<sup>730</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*, Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Congress (2021), written testimony of Thomas A. Saenz at 4.

<sup>731</sup> *Id.*

<sup>732</sup> *Voting Rights and Election Administration in Arizona*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), written testimony of Patty Ferguson-Bohnee at 8.

<sup>733</sup> *Id.*

<sup>734</sup> *Voting Rights and Election Administration in the Dakotas*: Hearing Before the Subcomm. on Elections, 116<sup>th</sup> Cong. (2019), see hearing transcript.

<sup>735</sup> *Id.*, see testimony of State Representative Ruth Buffalo.

<sup>736</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*, Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Congress (2021), written testimony of Patty Ferguson-Bohnee at 7.

<sup>737</sup> *Id.* (citing *Kirkie v. Buffalo County*, CIV No. 03-3011 (D.S.D. Feb. 12, 2004) (Consent Decree)).

<sup>738</sup> *Id.*

Professor Ferguson-Bohnee testified that, in 2005, another South Dakota County was forced to redraw district lines “for similar malapportionment of Indian voters.”<sup>739</sup> Professor Ferguson-Bohnee testified that “[p]reclearance may have prevented this type of *de facto* discrimination, because the changes would have needed preclearance approval prior to enactment.”<sup>740</sup>

Dividing tribal communities and ignoring tribal boundaries in the redistricting process also dilutes the Native American vote. Professor Ferguson-Bohnee testified that, while dividing reservation boundaries may be required to meet equal population requirements and to enhance voter effectiveness, there “are several examples of redistricting schemes that divide tribal communities to reduce voting strength.”<sup>741</sup> Professor Ferguson-Bohnee notes that, for example, in recent years redistricting bodies have divided tribal communities into multiple districts in Wisconsin, Washington, Montana, and California—in Washington, the maps split three separate reservations.<sup>742</sup>

Mr. Vattamala testified that, in the past, redistricting plans have also diluted Asian American voting strength by fragmenting communities into multiple districts.<sup>743</sup> Mr. Vattamala highlighted that Section 5 coverage was not only in the South—New York previously had three covered counties as well, which helped protect minority communities.<sup>744</sup> In New York City, for example, Mr. Vattamala testified that congressional district boundaries have divided Asian American communities.<sup>745</sup> In the case *Favors v. Cuomo*, AALDEF submitted materials superimposing the existing State Assembly and Senate, and Congressional district lines over the Asian American communities of interest, illustrating how divided each of the communities were among multiple districts, essentially denying the community the ability to elect candidates of their choice.<sup>746</sup>

Mr. Vattamala testified that:

AALDEF was ultimately able to convince the Special Master to draw a fair congressional district in Queens that kept Asian American [Communities of Interest] whole, and together. Several months later that district elected the first Asian American to Congress from New York State, and it was primarily because the community was finally allowed the opportunity to elect a candidate of its choice. This result was likely only possible through federal litigation.<sup>747</sup>

Mr. Vattamala testified that the Asian American community, working together with the Black community and the Latino community, formed what they call a unity map that “protected all the communities of color that were protected under the Voting Rights Act,” and that it was very

<sup>739</sup> *Id.* (citing *Blackmoon v. Charles Mix County*, 505 F.Supp.2d 585 (D.S.D. 2007)).

<sup>740</sup> *Id.*

<sup>741</sup> *Id.* at 10.

<sup>742</sup> *Id.*

<sup>743</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*, Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Congress (2021), written testimony of Jerry Vattamala at 9.

<sup>744</sup> *Id.*, hearing transcript at 19.

<sup>745</sup> *Id.*, written testimony at 9.

<sup>746</sup> *Id.*

<sup>747</sup> *Id.*

powerful to have the knowledge that Section 5 existed, that the map drawers started from a position of ensuring they were complying with Section 5 and “not retrogressing districts.”<sup>748</sup> Those protections are no longer in place.

Partisan gerrymandering is also a form of vote denial and dilution that can disproportionately impact minority voting power when minority voters heavily favor one party over another. In 2019, however, the Supreme Court in *Rucho v. Common Cause* declined to weigh in on the question of when partisan gerrymandering has crossed constitutional bounds, holding that partisan gerrymandering claims are nonjusticiable, presenting political questions beyond the reach of the federal court.<sup>749</sup> This decision leaves voters vulnerable to 50 different interpretations of what constitutes an impermissible partisan gerrymander in the upcoming redistricting cycle. In their opinion, the Court did, however, leave space for Congress to formulate a test for determining when a map constitutes a partisan gerrymander.

## CONCLUSION

The evidence before the Subcommittee is clear, changes to method of election, redrawing jurisdictional boundaries, and the redistricting process have all been used time and again to dilute the voting power of minority voters, denying them the opportunity to elect candidates of their choice and a real voice in democratic governance. Redistricting cases “typically require massive amounts of attorney time and millions of dollars in expert fees,”<sup>750</sup> leaving many communities vulnerable to discrimination and suppression when voting rights litigators cannot intervene on their behalf and without the proactive protections of a federal preclearance regime. As former Attorney General Holder testified, “[w]e need to end gerrymandering, so that all people, including people of color, can be represented by public servants of their choice and be able to hold those representatives politically accountable.”<sup>751</sup>

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<sup>748</sup> *Id.*

<sup>749</sup> *Rucho et al. v. Common Cause et al.* 588 U.S. \_\_\_\_ (2019).

<sup>750</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*, Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Congress (2021), written testimony of Jerry Vattamala at 10.

<sup>751</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*, Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Congress (2021), written testimony of Eric H. Holder, Jr. at 4.

# CONCLUSION

The *Voting in America* hearings conducted by the Subcommittee show conclusively that discrimination in voting does, in fact, still exist. The evidence gathered by the Subcommittee not only illustrates that discrimination exists, but that it has grown steadily in the wake of the Supreme Court's decision in *Shelby County*. Furthermore, the evidence demonstrates that the "extraordinary measures"<sup>752</sup> once deployed by the Voting Rights Act remain necessary today, and that the removal of those safeguards released a torrent of voter suppression laws the VRA once succeeded in holding back.

As former Attorney General Eric Holder testified:

Before 2013, Section 5 had helped prevent discriminatory voting laws from taking effect by imposing preclearance protections that required a federal review of changes to voting procedures in covered regions. Basically, areas with a history of discrimination had to get approval from the Department of Justice or from a federal court for significant changes in voting laws or procedures. That section of the Voting Rights Act had helped to stop some of the worst attempts to discriminate against minority voters for decades. But in a five-to-four opinion, the conservative members of the Court wrote that the nation had "changed dramatically" since the Voting Rights Act went into effect and that, because of gains made, particularly by Black Americans, these protections were no longer necessary.<sup>753</sup>

The evidence demonstrates that the nation has not changed as dramatically as the Court's majority may have thought. In the eight years since *Shelby County* was decided, states have taken significant steps toward suppressing the vote. Across the country, states have purged millions of voters from the voting rolls; enacted a rash of strict voter ID laws; attempted to implement documentary proof of citizenship laws; failed to provide necessary language access and assistance to limited-English proficiency voters; closed, consolidated, or relocated hundreds if not thousands of polling locations, causing voters to wait in long, burdensome lines to vote; attempted to cut back on opportunities to vote outside of Election Day; and employed changes to methods of elections, jurisdictional boundaries, and redistricting as methods to dilute and disenfranchise minority voters.

Litigation under Section 2 of the Voting Rights Act and the Constitution has proven to be a powerful but inadequate tool to combat the wave of voter suppression tactics unleashed in the years since *Shelby*. Janai Nelson, Associate Director-Counsel for the NAACP Legal Defense Fund, testified that, in the first five years following *Shelby* "an unprecedented 61 lawsuits were filed under Section 2 of the Voting Rights Act," of which "[t]wenty-three cases were

<sup>752</sup> *Shelby County v. Holder*, 570 U.S. 529 (2013), also citing *Northwest Austin*, 557 U.S., at 203.

"The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements. As we put a short time ago, 'the Act imposes current burdens and must be justified by current needs.'"

<sup>753</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting*: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong. (2021), written testimony of Eric H. Holder, Jr. at 1.

successful.”<sup>754</sup> By contrast, “in the five years before *Shelby*, only five Section 2 cases were won.”<sup>755</sup> Litigation alone is not an adequate remedy to protect the right to vote—cases arising under Section 2 of the Voting Rights Act are reactive, costly, and can take years to litigate.

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*“Across diverse backgrounds—and in the face of a once-in-a-century global pandemic—people turned out last year to vote in unprecedented numbers. It was an awe-inspiring moment of the world’s oldest and greatest democracy. It was a declaration of the possibility of our nation to live up to its highest ideals. And it was a recognition that the right to vote is fundamental to the preservation of all other rights.”*

— Wade Henderson, Interim President & CEO, The Leadership Conference

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The 2018 and 2020 elections saw record voter turnout. While this is indeed an outcome to be celebrated, it is not, as some argue, an indication that voter suppression and discrimination no longer exists. The evidence gathered by the Subcommittee demonstrates that voters turned out in record numbers *despite* suppressive voting laws and a once-in-a-century pandemic. And yet, the reaction of Republican-led legislatures around the country to historic voter turnout has been to unleash a new wave of restrictive voting laws in the months following the 2020 election. States with a history of discriminatory voting practices and racially polarized voting continue to enact voting laws without analyzing whether these provisions discriminate against minority voters.

heard time and again, numerous investigations have found no credible evidence of fraud in the 2020 election. Indeed, according to cyber and elections security experts, “the November 3rd [2020] election was the most secure in American history.”<sup>756</sup> Unfortunately, fueled by the “Big Lie” that the election was stolen, insurrectionists attempted to stop the certification of a lawful, valid, democratic presidential election by storming the Capitol on January 6, 2021. In the six months since the attack, efforts to suppress the vote and subvert democracy have continued, as state legislatures have moved quickly to meet the increase in voter turnout with voter suppression.

According to the Brennan Center for Justice, as of May 14, 2021, more than 389 bills in 48 states have been introduced restricting the vote.<sup>757</sup> As of June 21, 2021, 17 states have enacted 28 new laws that restrict access to the vote, with some state legislatures still in session.<sup>758</sup> At least 16 restrictions on mail voting will make it more difficult for voters to cast mail ballots

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<sup>754</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong.* (2021), testimony of Janai S. Nelson, hearing transcript at 66.

<sup>755</sup> *Id.*

<sup>756</sup> *Joint Statement From Elections Infrastructure Government Coordinating Council & The Election Infrastructure Sector Coordinating Executive Committees*, U.S. Cybersecurity & Infrastructure Security Agency (release date: Nov. 12, 2020), <https://www.cisa.gov/news/2020/11/12/joint-statement-elections-infrastructure-government-coordinating-council-election>.

<sup>757</sup> *Voting Laws Roundup: May 2021*, BRENNAN CENTER FOR JUSTICE (May 28, 2021), [Voting Laws Roundup: May 2021 | Brennan Center for Justice](#).

<sup>758</sup> *Id.*

that count in 12 states.<sup>759</sup> At least eight states have enacted 11 laws making in-person voting more difficult.<sup>760</sup> And more bills are still moving through state legislatures.

These new laws only compound the legal and administrative hurdles enacted in the eight years since *Shelby*. As former Attorney General Holder testified:

These actions have not made our elections safer or more secure. They have not improved the quality or accessibility of our politics. Instead, they have stripped Americans of fundamental rights and undermined the promise of American democracy. And they have all—every one of them—disproportionately impacted people of color.<sup>761</sup>

For example, Michael Waldman, President of the Brennan Center for Justice, testified that “[i]n 2013, at least six states—Alabama, Mississippi, North Carolina, North Dakota, Virginia, and Texas—implemented or began to enforce strict photo ID laws, most of which had previously been blocked by the Department of Justice due to their discriminatory impact.”<sup>762</sup> Federal courts in at least four states have found strict voter ID laws to be racially discriminatory, including Texas and North Carolina’s laws.<sup>763</sup> In previously covered jurisdictions, 1,688 polling places were closed between 2012 and 2018, all with none of the disparate impact analysis previously required by preclearance.<sup>764</sup> Restrictions targeting early voting opportunities can and do have a direct impact on minority voters.

Thomas Saenz, President and General Counsel for MALDEF, testified that, “[t]here is simply no way that non-profit voting rights litigators, even supplemented by the work of a reinvigorated Department of Justice Civil Rights Division, could possibly prevent the implementation of all of the undue ballot-access restriction and redistricting violations that are likely to arise in the next two years.”<sup>765</sup>

The evidence compiled by the Subcommittee illustrates that the voting and election administration practices of purging voters from the voting rolls; enacting voter ID and proof of citizenship requirements; failing to provide necessary multi-lingual voting materials and assistance; closing, consolidating, or relocating polling places; cutting or restricting access to alternative opportunities to vote; and altering methods of election, jurisdictional boundaries, and redistricting disproportionately impacts Black, Latino, Native American, Asian American, and other minority voters and impedes access to the ballot in a discriminatory manner.

<sup>759</sup> *Id.*

<sup>760</sup> *Id.*

<sup>761</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong.* (2021), written testimony of Eric H. Holder, Jr. at 3-4

<sup>762</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong.* (2021), written testimony of Michael Waldman at 4.

<sup>763</sup> *Id.*

<sup>764</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong.* (2021), written testimony of Wade Henderson at 3.

<sup>765</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong.* (2021), written testimony of Thomas A. Saenz at 5.

Congress needs to listen to the American people. The Voting Rights Act was not written in the halls of Congress—it was written between Shelby and Montgomery. It was written by Americans who fought for equal access to what was promised to be a democracy. We are again hearing from the people on the need to protect the right to vote.

Defending democracy used to be a bipartisan endeavor. Since the Voting Rights Act first passed in 1965, Congress has acted several times, and in a bipartisan manner, to protect access to the vote. The Voting Rights Act was reauthorized five times with bipartisan votes—and signed into law each time by a Republican President. The 2006 VRA reauthorization was introduced by a Republican congressman. Moreover, Congress has passed additional voting bills, including the Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA) in 1986, the National Voter Registration Act (NVRA) in 1993, and the Help America Vote Act (HAVA) in 2002 with bipartisan support. Bipartisan commissions such as the Carter-Baker Commission and the Presidential Commission on Election Administration endeavored to create best practices in elections to improve the voting experience.

We are now at an inflection point in protecting our democracy. The time has come for Congress to utilize its constitutional authority to protect the fundamental right to vote for all Americans. As Mr. Henderson stated before the Subcommittee, “[f]or democracy to work for all of us, it must include all of us.”<sup>766</sup> “It is unacceptable that in 2021, 56 years after the VRA’s passage,” Ms. Nelson stated, that “the right to vote remains so very under-protected. . . . This model is not sustainable nor is it acceptable.”<sup>767</sup>

And as Chief Justice Earl Warren wrote in 1964, the year before the passage of the Voting Rights Act, the “right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of the representative government.”<sup>768</sup> After reviewing thousands of pages of evidence collected during this Congress and listening to the testimony of dozens of experts from across the country, as summarized in this report, the evidence demonstrates one clear command: Congressional action is needed.

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*“Voting is essential to our democracy.  
Indeed, it is the language of our democracy.”*

— Wade Henderson, Interim President  
& CEO, The Leadership Conference

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<sup>766</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong.* (2021), written testimony of Wade Henderson at 5.

<sup>767</sup> *Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting: Hearing Before the Subcomm. on Elections, 117<sup>th</sup> Cong.* (2021), testimony of Janai S. Nelson, hearing transcript at 68.

<sup>768</sup> *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).



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